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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 37

ZELLERBACH PAPER COMPANY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1934

CERTIORARI GRANTED JUNE 4, 1934

SUPREME COURT OF THE UNITED STATES

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPEARANCES.

For Taxpayer:

J. F. NEYLAN, Esq.,
J. P. MILLER, Esq.,
W. C. MAGATHAN, Esq.

For Comm'r:

H. A. COX, Esq.,
F. R. SHEARER, Esq.,
E. L. CORBIN, Esq.

Docket No. 39701

ZELLERBACH PAPER COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

Transferred to Mr. Murdock 3/28/32

1928

Jul. 9—Petition received and filed. Taxpayer notified. (Fee paid)

" 10—Copy of petition served on General Counsel.

Aug. 7—Answer filed by General Counsel.

" 9—Copy of answer served on taxpayer. Circuit Calendar.

1931

Feb. 10—Stipulation of facts filed.

Mar. 13—Motion for leave to file amended petition filed by taxpayer, amended petition tendered. 3/16/31 granted. 3/19/31 copy served.

1931

Apr. 24—Hearing set June 10, 1931 at Oakland, California.

May 12—Answer to amended petition filed by General Counsel. Copy served 5/27/31.

Jun. 10—Hearing held before E. H. Van Fossan, Div. 9, on merits. On motion of counsel consolidated with dockets 39704 and 39715 for hearing and decision. Briefs due in 60 days.

Jul. 13—Transcript of hearing of June 10, 1931 filed.

Aug. 6—Motion for extension of time to Aug. 31, 1931 to file brief filed by taxpayer. August 8, 1931 granted.

" 7—Motion for extension of 60 days from Aug. 9, 1931, to file brief filed by General Counsel.

" 11—Motion for extension of 60 days to file respondent's brief granted.

" 31—Brief filed by taxpayer.

Oct. 6—Brief filed by General Counsel.

1932

Jan. 21—Motion for leave to file reply brief filed by taxpayer. Granted 1/29/32.

" 29—Reply brief filed by taxpayer. 1/30/32 copy served on General Counsel.

May 17—Findings of fact and opinion rendered, John E. Murdock, Div. 3. Judgment will be entered under Rule 50.

" 21—Notice of appearance of J. Paul Miller as counsel for taxpayer filed.

1932

May 31—Notice of settlement filed by General Counsel.

Jun. 3—Hearing set June 29, 1932 under Rule 50.

" 29—Hearing had before Miss Matthews, Div. 13, on settlement under Rule 50. Not contested. Referred to Mr. Murdock for decision.

Jul. 9—Decision entered, Logan Morris, Div. 14. [1*]

Oct. 4—Supersedeas bond in the amount of $139,000 approved and filed.

" 4—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 4—Proof of service filed.

" 31—Praecipe filed.

" 31—Proof of service filed.

Nov. 23—Statement of evidence lodged.

" 23—Notice of lodgment and hearing notice 12/8/32 filed.

" 25—Notice of change of hearing date from Dec. 8, to Dec. 7, 1932.

" 30—Objections to statement of evidence filed by General Counsel.

Dec. 2—Order of U. S. Circuit Court of Appeals 9th Circuit enlarging time to 1/3/33 to transmit record filed.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Dec. 2—Motion for a continuance to January 6, 1933 for hearing on statement of evidence filed by taxpayer. 12/5/32 granted and set for hearing Dec. 28, 1932.

" 15—Proof of service of objections filed by General Counsel.

" 27—Order from U. S. Circuit Court of Appeals (9) extending time to Feb. 3, 1933 to file transcript filed.

" 28—Hearing had before Mr. Sternhagen on approval of statement of evidence. Continued to Jan. 11, 1933 on motion of petitioner.

" 28—Order of continuance to Jan. 11, 1933 for hearing on approval of statement of evidence entered.

1933

Jan. 7—Order from Circuit Court of Appeals, 9th Circuit to transmit petitioner's exhibit No. 1 and respondent's exhibit A in original form filed.

" 11—Hearing had before Mr. Arundell on approval of statement of evidence. Continued to Jan. 25, 1933.

" 11—Motion to postpone hearing to Jan. 20, 1933 filed by taxpayer. 1/11/33 granted to 1/25/33.

" 23—Copy of order from 9th Circuit enlarging time to March 3, 1933 to file transcript filed.

1933

Jan. 25—Hearing had before Mr. Marquette on approval of statement of evidence. On petitioner's motion continued to 2/15/33.

Feb. 15—Hearing had before Mr. Murdock on approval of statement of evidence. Agreed statement of evidence to be filed.

" 28—Copy of order from U. S. Circuit Court of Appeals (9) granting extension to 4/3/33 to complete record filed.

Mar. 14—Order from U. S. Circuit Court of Appeals, 9th Circuit consolidating with dockets 39704 and 39715 to send up one record filed.

Apr. 3—Order from U. S. Circuit Court of Appeals, 9th Circuit extending time to 5/3/33 to complete record filed.

May 4—Order from U. S. Circuit Court of Appeals, 9th Circuit extending time to 6/3/33 to complete record filed.

" 8—Hearing had before J. E. Murdock, Div. 3 on settlement of evidence. Agreed statement to be filed.

" 19—Agreed statement of evidence lodged.

" 19—Amended praecipe filed.

" 19—Proof of service filed.

" 23—Agreed statement of evidence approved and ordered filed.

Jun. 2—Order from U. S. Circuit Court of Appeals (9) extending time to 7/3/33 to complete record filed.

" 2—Stipulation that transcript of minutes of hearing 5/8/33 be included in record filed. [2]

United States Board of Tax Appeals

Docket No. 39701

ZELLERBACH PAPER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:D:60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of California and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on May 11, 1928.

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and for Sixty-four Thousand Twenty-four and 37/100 Dollars ($64,024.37). [3]

The deficiency of $64,024.37 is a portion of a total deficiency of $96,854.59, assessed by the Commissioner of Internal Revenue against Zellerbach

Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Company (subsidiary)	31,141.52
A. S. Hopkins Company (subsidiary)	1,688.70
Total deficiency	$96,854.59

The above total deficiency is based upon certain adjustments made by the Commissioner of the consolidated income of Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation and A. S. Hopkins Company.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

A. ZELLERBACH PAPER COMPANY.

(a) The Commissioner erred in determining the deficiency set forth in his 60-day letter dated May 11, 1928, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, because the assessment of any additional tax for the said fiscal year is barred by Section 250.(d) of the Revenue Act of 1918; Section 250.(d) (1) of the Revenue Act of 1921; Section 277.(a) . . (1) and Section 277.(a) . . (2) of the Revenue Act of 1924; [4] and Section 277.(a) . . (2) and Section 277.(a) (3) of the Revenue Act of 1926.

(b) The Commissioner in determining the deficiency set forth in his 60-day letter dated

May 11, 1928, erred in proceeding upon the theory that inasmuch as the petitioner had filed its income tax return under the Revenue Act of 1918, but no additional return was filed by the petitioner under the Revenue Act of 1921, that no statute of limitation applies.

(c) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred by ignoring the fact that inasmuch as there were no items of income or deduction in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and since the rates of income and profits taxes were the same under both Revenue Acts for the fiscal year involved, no additional tax would be shown by the filing of a second return under the 1921 Act; a proper return having been filed under the 1918 Act by this taxpayer.

(d) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $7,293.86 to the petitioner's income [5] representing a write-down of the petitioner's inventory at Batavia, Java, branch from cost to fair market value as at April 30, 1921.

(e) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $2,249.61 to the petitioner's income representing losses of customers' accounts at the petitioner's Batavia,

Java, branch actually determined during the fiscal year ending April 30, 1921.

(f) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $4,167.29 to the petitioner's income representing an actual loss in value (discovered in February 1921) of an inventory of merchandise as at December 31, 1920, and other assets which had been acquired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing as a deduction from the petitioner's income, $840.00, representing wages paid by the taxpayer to the captain of the yacht owned by I. Zellerbach (petitioner's president), which yacht was used in connection with the petitioner's business. [6]

B. NATIONAL PAPER PRODUCTS COMPANY

(h) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing $21,421.05, representing write-down of the value of the wood in process inventory of National Paper Products Company at Carthage, New York, from cost to actual market value as at April 30, 1921.

C. CONSOLIDATED INVESTED CAPITAL

(i) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in excluding from the petitioner's invested capital the amount of $10,000.00, representing the value of certain patents, which value had been substantiated by the taxpayer.

(j) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of the taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

[7]

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

The petitioner, Zellerbach Paper Company, is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office at 534 Battery Street, San Francisco, California.

The National Paper Products Company and Sanitary Products Corporation were throughout the fiscal year ended April 30, 1921, wholly

owned subsidiaries of the petitioner.

The majority of the capital stock of A. S. Hopkins Company was acquired by the petitioner on or about October 1, 1920, and the remaining outstanding shares were acquired shortly thereafter, and this subsidiary corporation was dissolved and its assets taken over in liquidation by Zellerbach Paper Company about February 28, 1921, in exchange for the shares of its stock which were cancelled.

The net income of A. S. Hopkins Company for the nine months period ended September 30, 1920, was included in a separate income tax return which was filed with the Collector of Internal Revenue at San Francisco, California, March 15, 1921. The income of A. S. Hopkins Company from and after October 1, 1920, to and including the date of its dissolution, about February 28, 1921, was included in the consolidated income tax return filed by Zellerbach Paper Company and its subsidiaries for the fiscal year [8] ended April 30, 1921. From and after the date of the liquidation of A. S. Hopkins Company, the business which it had formerly conducted at Sacramento, California, was conducted by Zellerbach Company as its Sacramento branch.

The petitioner filed a consolidated income tax return July 15, 1921, covering its own income and the income of National Paper Products Company and Sanitary Products Corporation for the fiscal year ended April 30, 1921, and also

included therein the income of A. S. Hopkins Company from October 1, 1920 to the date of its dissolution. This consolidated income tax return was correctly prepared in accordance with the provisions of the Revenue Act of 1918, which was the revenue act in effect at the time that the said return was due. The said consolidated income tax return filed on July 15, 1921, was the only income tax return that has been filed by the taxpayer. All items of income and expense included in the taxpayer's operations and in the operations of its subsidiaries are reflected in the said consolidated income tax return filed on July 15, 1921 and are of such nature that the Revenue Act of 1921 is applicable thereto in exactly the same manner as the Revenue Act of 1918. The taxpayer, after the enactment of the Revenue Act of 1921, did not prepare and file another return; such return, if filed, would have been of exactly the same tenor as the return which had already been filed by the taxpayer on July 15, 1921, as the various items of income and the [9] expense included in the operations of the taxpayer and its subsidiaries were required to be treated exactly the same under both the Revenue Act of 1918 and the Revenue Act of 1921.

The first deficiency notice for the fiscal year ended April 30, 1921, received by the petitioner from the Commissioner of Internal Revenue was mailed to the petitioner on May 11, 1928, being

received by the petitioner several days thereafter.

The said first deficiency notice was mailed more than five years after said consolidated income tax return for the fiscal year ended April 30, 1921 was filed, to-wit; approximately six years and ten months thereafter.

The taxpayer has never entered into any agreement in writing or otherwise with the Commissioner of Internal Revenue consenting to a later determination, assessment and/or collection of income or profits taxes or extending the time for said determination, assessment and/or collection of tax to any date beyond the statutory limitations provided by the Revenue Acts applicable to the tax for the fiscal year here in issue. The taxpayer has never waived the right to file a petition with the United States Board of Tax Appeals, nor consented to the assessment and collection of any deficiency in tax for the fiscal year ended April 30, 1921. [10]

During the fiscal year ended April 30, 1921 and for a number of years prior thereto, the taxpayer had operated a branch at Batavia, Java. Owing to the business depression in Java in the years 1920, 1921 and 1922, the taxpayer realized a profit of only $6,977.63 from the operations of this branch for the fiscal year ended April 30, 1921. In the succeeding fiscal year conditions were even worse, and the Batavia branch sustained losses aggregating $11,-351.29. In making determination of the pro-

fits of the Batavia branch for the fiscal year ending April 30, 1921, it was necessary to write down certain items in the inventory of merchandise from cost to the market value at April 30, 1921. The aggregate reduction of the inventory thus obtained was $7,293.86. Owing to the depressed business conditions, a review of accounts receivable of the Batavia branch indicated that items aggregating $2,249.61 included therein would be uncollectible, and a reserve was set up to take care of these losses.

The Commissioner in making his determination of the taxpayer's income disallowed the $7,293.86 write-down of the inventory and the reserve of $2,249.61 to provide for the losses of accounts, upon the theory that the write-down of inventory was a mere depreciation of inventory and that the loss of accounts receivable provided for by the reserve was merely an estimated loss. [11]

During the fiscal year ended April 30, 1921, and as at about December 31, 1920, Zellerbach Paper Company received as transferee from A. S. Hopkins Company an inventory of certain merchandise and certain accounts receivable owing to A. S. Hopkins Company and other assets. Certain merchandise of A. S. Hopkins Company having a value of $4,167.29 had been previously transferred to Zellerbach Paper Company and charged to it by the Hopkins Company. At the time of taking over the said assets from A. S. Hopkins Company, the value of this merchan-

dise, $4,167.29, was reflected on the books of the Hopkins Company as an account receivable. Owing to the fact that from about October 1, 1920, Zellerbach Paper Company had been in control of A. S. Hopkins Company, the corresponding credit of $4,167.29 had not been recorded on the books of Zellerbach Paper Company as a liability to A. S. Hopkins Company, although the merchandise received from the Hopkins Company had been included in Zellerbach Paper Company's inventories of merchandise, and, thus, when Zellerbach Paper Company took over all the assets of the Hopkins Company, (including the said account receivable of $4,167.29 on the books of A. S. Hopkins Company) the value of this account receivable was, in effect, a duplication in value of certain merchandise included in the merchandise inventories of Zellerbach Paper Company, which duplication in value had been taken up as income. [12]

In February 1921, this duplication was discovered, and the amount of $4,167.29 was charged to Zellerbach Paper Company's surplus account. The Commissioner disallowed this charge of $4,167.29 as a deduction and added it to the taxpayer's net income for the fiscal year ended April 30, 1921.

Mr. I. Zellerbach, during the fiscal year ended April 30, 1921, was, and still is, the president of Zellerbach Paper Company. He was the owner of a yacht which he used for the purpose of

entertaining business associates and customers of Zellerbach Paper Company and its subsidiary companies. The wages of the captain of this yacht, $840.00 for the fiscal year ended April 30, 1921, were paid by Zellerbach Paper Company and charged to its expenses. The Commissioner disallowed this expense upon the theory that it was not an ordinary and necessary expense of the business.

The National Paper Products Company, at the close of the fiscal year ended April 30, 1921, in taking its inventory at cost or market, whichever is lower, wrote down the value of its inventory of wood in process at its rossing plant at Aldrich, New York, in the amount of $21,-421.05. Certain timber had been cut and placed in the rossing process and records had been kept of the various costs applied to this timber in the said process. The wood in the inventory was situated at the company's plant at Aldrich, which was some distance from Carthage, New York, the point at which this wood was to be marketed. [13] To determine a market value applicable to this wood in process at Aldrich, the National Paper Products Company first applied the market price at Carthage and thereafter deducted the transportation and other costs which would have to be incurred in bringing this wood from Aldrich to Carthage.

The Commissioner disallowed the said write-down of the wood inventory on the assumption

that the market value had not been substantiated.

As at October 5, 1914, the National Paper Products Company (a subsidiary of the petitioner) acquired certain patents from the Lazar-Aicher Paper Company in exchange for $100,000 par of the capital stock of the National Paper Products Company. Subsequently, cash expenditures of $3,759.05 were made in perfecting these patents, and additional patents were acquired for $10,000 cash. These patents acquired for capital stock were originally set up on the books of the National Paper Products Company at a value of $100,000. By a subsequent book entry, $90,000 of the patent account was set up in an account designated "Goodwill". This goodwill of $90,000 was, as at April 30, 1916, written off against surplus.

The Commissioner refused to recognize any value as attaching to the patents acquired for capital stock and excluded the amount of $10,000 at which these patents were carried in the fiscal year ended April 30, 1921, in making his determination of the petitioner's consolidated invested capital. [14]

6. The petitioner prays for relief from the deficiency asserted by the Commissioner in the following and each of the following particulars:

(a) The petitioner prays the Board to find that the assessment of any additional tax for

the fiscal year ended April 30, 1921, is barred by Sections 250. (d) of the Revenue Act of 1918; Section 250. (d) . . . (1) of the Revenue Act of 1921; Section 277. (a) . . . (1) and Section 277. (a) . . . (2) of the Revenue Act of 1924; and Section 277. (a) . . . (2) and Section 277. (a) . . . (3) of the Revenue Act of 1926.

(b) The petitioner prays the Board to find that the Commissioner erred in proceeding upon the theory that inasmuch as no additional return was filed by the petitioner under the Revenue Act of 1921 after a return under the Revenue Act of 1918 had been filed, no statute of limitations applies.

(c) The petitioner prays the Board to find that there are no items of income or deduction in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and that the rates of both income tax and excess profits tax for the fiscal year ended April 30, 1921, are the same under the Revenue Acts of 1918 and 1921, and that the filing of an additional return under the Revenue Act of 1921 was not required, as a proper return had been filed under the 1918 Act by the petitioner.

(d) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to write down its inventory

at Batavia, Java, branch by $7,293.86, being the excess of cost over its fair market value as at April 30, 1921.

(e) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to charge off as a deduction $2,249.61 representing losses of customers accounts at Batavia, Java, branch actually determined as at April 30, 1921.

(f) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to deduct therefrom $4,167.29 representing an actual loss in the value of merchandise and other assets which had been acquired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The petitioner prays the Board to find that Zellerbach Paper Company in determining its net income for the fiscal year ended April 30, 1921, is entitled to claim a deduction for $840.00 representing wages paid to the captain of the yacht owned by I. Zellerbach, used in connection [16] with petitioner's business.

(h) The petitioner prays the Board to find that National Paper Products Company in determining its income for the fiscal year ended April 30, 1921, is entitled to a deduction of $21,421.05 representing write-down of the value of its wood in process inventory at Carthage, New York, as at April 30, 1921.

(i) The petitioner prays the Board to find that it is entitled to have included in the consolidated invested capital of Zellerbach Paper Company and subsidiaries for the fiscal year ended April 30, 1921, the amount of $10,000.00 representing the value of certain patents which had been substantiated, but were disallowed by the Commissioner.

(j) The petitioner prays the Board to find that the Commissioner erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of the petitioner's taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

(k) The petitioner prays for such other and further relief as the nature of the case may require, and [17] which to the Board may seem equitable and proper in the premises.

WHEREFORE, the petitioner prays that the Board may hear and redetermine that there is no deficiency.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner,
Crocker First National Bank Bldg.
San Francisco, California. [18]

State of California,
City and County of San Francisco.—ss.

A. Vander Zwiep, being duly sworn, says that he is the Secretary of Zellerbach Paper Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

A. VANDER ZWIEP.

Subscribed and sworn to before me this 5th day of July, 1928.

(Seal) LULU A. GODSIL,
Notary Public.

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires September 13, 1931. [19]

Copy

EXHIBIT A.

TREASURY DEPARTMENT
Washington

May 11, 1928

Office of
Commissioner of Internal Revenue

IT:CR:D:60D
CAM

Zellerbach Paper Company,
534 Battery Place,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1921, discloses a deficiency of $64,024.37, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the

attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) C. B. ALLEN,
Deputy Commissioner.

Inclosures

Statement.
Form A.
Form 882. [20]

IT:CR:D:60 D
CAM

STATEMENT OF RETURNS EXAMINED
AND
RESULTING TAX LIABILITY

Company	Fiscal Year	Form	Deficiency in Tax
Zellerbach Paper Company, San Francisco, Calif.	April 30, 1921	1120 Consolidated	$64,024.37
National Paper Products Co., San Francisco, Calif.	April 30, 1921	1120 Consolidated	$31,141.52
A. S. Hopkins Company San Francisco, Calif.	Period Nov. 1, 1920 to April 30, 1921	1120	$ 1,688.70

The adjustments producing the above-stated results are shown in the attached Schedules 1 to 15, inclusive.

The information submitted in your brief dated February 7, 1928, has been carefully considered.

Your contention that "Depreciation on Merchandise" and "Estimated Bad Accounts", included as taxable income in Batavia Branch, were allowable deductions is denied, as your contention is not substantiated.

Your contention that "Inventory Transfer from A. S. Hopkins Company" is an allowable deduction is denied as same is allowed to A. S. Hopkins Company as a deduction, Schedule 6.

Your contention that items charged to dues and subscriptions in the amount of $470.00, are necessary business expenses is allowed for "Membership Fee, Kiwanis Club" and "Subscription to Linweave Association" but denied for "Book Club of California (J. D. Zellerbach)". [21]

Your contention that items charged to headquarters expense are allowable is conceded for the "Cancellation of Contract", but denied for "Salary to captain of J. Zellerbach's private yacht." The mere fact that customers were occasionally entertained on the yacht is not sufficient reason for allowing the deduction.

Your contention relative to the following items, National Paper Products Company is sustained and allowed:

1. Loss in operation, Brooklyn Soap Plant.
2. Gifts to employees.

3. Unallowable deduction.

Your contention that "Depreciation of Wood Inventory" is allowable is not substantiated.

Your contention for additional depreciation, Carthage Branch has been previously denied for prior years and no evidence having been submitted in your brief to substantiate your claim, the previous denial is sustained.

Your contention that net income for the two months ended December 31, 1920 of A. S. Hopkins Company, should not be included is denied. Evidence shows that the above-named company was affiliated with your company for the period November 1, 1920 to April 30, 1921, accordingly the income for that period is properly income of the consolidation. Adjustment will be made to A. S. Hopkins Company.

Your contention that Patents disallowed from invested capital should be restored in the amount of $10,000.00, has been denied for prior years and that decision is herein sustained.

Your contention for adjustments of taxes prior years and inadmissibles are dependent upon prior years which are still in controversy and no adjustment can be made in this audit.

Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds that no Statute of Limitations applies.

A copy of this letter has been mailed to John Francis Neylan in accordance with the authorization contained in your power of attorney dated March 3, 1925, running to him, which is on file in this office [22]

Zellerbach Paper Company. | Year ended April 30, 1921.

SCHEDULE 1.

Net Income

Net income as disclosed by return		$532,238.29
As corrected		774,423.89
Net adjustment		$242,185.60
Unallowable deductions and additional income:		
(1) Deductions allowed prior years	$ 12,192.70	
(2) Items charged to surplus adjustment	15,452.75	
(3) National Paper Products Company Surplus	2,627.38	
(4) Items charged to dues and subscriptions	4,305.37	
(5) Items charged to Headquarters expense	840.00	
(6) Capital expenditures	24,967.78	
(7) Royalties received	2,057.99	
(8) Realized intercompany profit	30,984.78	
(9) Profit on furniture and fixtures	47.72	
(10) Reserve for contingencies	3,398.38	
(11) Taxable Income Batavia Branch	16,521.10	
(12) Auto insurance deducted twice	6,106.48	
	$119,502.43	

Zellerbach Paper Company. Year ended April 30, 1921.

Schedule 1, continued

(13) Bad debts deducted twice	$144,091.38	
(14) Dividends received from domestic corporation overstated	21,000.00	
(15) Depreciation disallowed	10,887.51	
Total		$295,481.32
Nontaxable income and additional deductions:		
(16) Income reported prior years	$ 33,903.78	
(17) Adjusting book value of automobile	219.67	
(18) Items not deducted	2,504.14	
(19) Commissions	15,000.00	
(20) Loss on automobiles	1,668.13	
Total		$ 53,295.72
Net adjustment as above		$242,185.60

[23]

SCHEDULE 2.

Explanation of Items Changed

(1) Charges to surplus during taxable year which were allowed as deductions in prior years.

(2) Amounts charged to surplus not allowable deductions being in effect capital items.

(3) National Paper Products Company surplus charged to Zellerbach surplus April 30, 1921.

(4) Donations charged to surplus:

Y. W. C. A.	$ 500.00
Salvation Army	100.00
National Democratic Convention	100.00
Y. M. C. A.	200.00
Better America Federation	150.00
Book Club of California (J. D. Zellerbach)	250.00
San Francisco War Memorial	2,500.00
48 Hour League	405.37
Portland Branch expense (Not substantiated)	100.00
Total	$4,305.37

Schedule 2, continued

(5)	Salary of captain private yacht J. Zellerbach not deductible.		
(6)	Building improvements, 534 Battery Street		$ 20,964.21
	Second Street Tunnel assessment		4,003.57
	Total		$ 24,967.78
(7)	Royalties received not reported.		
(8)	Intercompany profit eliminated from inventory April 30, 1920, realized during taxable year.		
(9)	Profit on furniture and fixtures sold:		
	Selling Price		$ 2,109.92
	Cost	$ 3,863.95	
	Less: Depreciation	2,126.75	1,737.20
	Profit corrected		$ 372.72
	Less: Reported		325.00
	Additional profit		$ 47.72

[24]

Schedule 2, continued

(10) Self-Explanatory.

(11) Profit of Batavia, Java Branch taken up on books March 31, 1922, properly income taxable year.

(12) and (13) Self-explanatory.

(14) Income received from a foreign corporation deducted as dividends of Domestic Corporations, not allowable deduction.

(15) Depreciation per books		$ 59,873.09
Restored on return		48,779.13
Understated		$ 11,093.96
Depreciation corrected Exhibit A-6	$ 55,406.65	
Add - Amortization of lease acquired May 1, 1920 or $21,000.00. prorated for 10 years	2,100.00	
	$ 57,506.65	
Deducted on return	57,300.20	
Additional deduction		206.45
Net depreciation disallowed		$ 10,887.51

(16) Self-explanatory

(17) Net adjustment of book value of automobile account credited to surplus.

(18) Additional deductions charged to surplus July 31, 1921, properly applicable to taxable year.

(19) Commissions credited to sales February 9, 1921, disallowed as a deduction 1920.

(20) Loss on automobiles sold:

Cost	$ 27,631.53
Less: Depreciation	12,174.76
Net Value	$ 15,456.77
Selling Price	13,946.74
Less corrected	$ 1,510.03
Profit reported	158.10
Additional loss herein	$ 1,668.13

Zellerbach Paper Co.
National Paper Products Co.

Year ended April 30, 1921

SCHEDULE 3.
Net Income

Net income as disclosed by return		$228,010.05
As corrected		355,297.11
Net adjustment		$127,287.06
Unallowable deductions and additional income:		
(1) Decrease in reserve for losses overstated	$ 525.00	
(2) Bad debts deducted twice	2,697.41	
(3) Loss on assets overstated	99.32	
(4) Inventory April 30, 1920 overstated, Carthage	5,568.06	
(5) Income adjustments	550.48	
(6) Donations, etc.	550.00	
(7) Contingent loss	8,189.43	

Zellerbach Paper Co.
National Paper Products Co.

Year ended April 30, 1921

Schedule 3, continued.

(8) Inventory April 30, 1921 understated	840.00	
(9) Depreciation wood inventory	21,421.05	
(10) Increase "Wood in Process" inventory	652.65	
(11) Depreciation disallowed	94,018.72	
		135,112.12
Nontaxable income and additional deductions:		
(12) Income applicable to prior years	$ 1,293.95	
(13) Loss on assets abandoned	5,878.46	
(14) Depletion	652.65	
Total		7,825.06
Net adjustment as above		$127,287.06

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SCHEDULE 4.

Explanation of Items Changed.

(1) and (2) Self-explanatory		
(3) Loss claimed on assets sold		$ 648.35
Corrected:		
Cost	$ 3,586.09	
Less: Depreciation	320.03	
	3,266.06	
Selling Price	2,717.03	
Loss corrected		549.03
Overstated		$ 99.32
(4) Decrease wood inventory April 30, 1920		$ 22,736.59
Less: Depreciation of inventory disallowed		17,168.53
Net adjustment herein		$ 5,568.06

Zellerbach Paper Co. Year ended April 30, 1921

Schedule 4, continued.

(5) Items credited surplus April 30, 1922, properly income during taxable year.

(6) Gift Mrs. Bobrick	$	250.00
American Defense Society		250.00
Not substantiated		50.00
Total	$	550.00

(7) The difference between contract purchase price and market price on cases as at April 30, 1921 on deliveries to be received subsequent to April 30, 1921, not an allowable deduction.

(8) Additional cost of $28.00, a thousand on 30,000 cases charged to profit and loss.

(9) Depreciation of wood inventory not deductible.

(10) Contra of (14) below.

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Schedule 4, continued.

(11) Depreciation on books		$173,469.39
Restored on return		148,091.58
Understated		$ 25,377.81
Depreciation corrected Valuation Report dated April 8, 1927:		
Carthage Branch, Schedule 9	$ 33,967.78	
San Francisco Branch, Schedule 11,	23,288.33	
Stockton Branch, Schedule 12	62,252.44	
Total	$119,508.55	
Deducted on return	188,149.46	68,640.91
Total disallowed		$ 94,018.72

(12) Self-explanatory

(13) See Schedule 8, valuation report dated April 8, 1927.

(14) Depletion allowed as shown in valuation report dated March 26, 1927 $ 652.65

Zellerbach PaPaper Co. Year ended April 30, 1921

SCHEDULE 5
Net Income

The Sanitary ry Products Corporation.		
Net loss as di disclosed by books		$ 542.54
As corrected d		1,813.51
Net adjustmenent		$ 1,270.97
Nontaxable ir income and additional deductions:		
(1) Dividenends received	14.00	
(2) Intercoompany interest	1,256.97	
Net adjustmenent as above		$ 1,270.97

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SCHEDULE 6.
Net Income

Net income as disclosed by books calendar year 1920		$ 28,134.16
As corrected for period Nov. 1 to Dec. 31, 1920		10,700.61
Net adjustment		$ 17,433.55
Unallowable deductions and additional income:		
(1) Donations	$ 492.00	
(2) Income Taxes paid	5,553.77	
(3) Dividends paid	15,410.00	
(4) Surplus adjustment	14,176.66	
(5) Inventory understated December 31, 1920	10,136.63	
(6) Income not reported	871.89	
Total		46,640.95

Zellerbach Paper Co.
A. S. Hopkins Company

Year ended April 30, 1921

Schedule 6, continued.

Nontaxable income and additional deductions:			
(7) Nontaxable interest		$ 166.82	
(8) Additional depreciation		5,715.28	
(9) Deductions not taken		4,689.34	
(10) Amount applicable to period Jan. 1 to Oct. 31, 1920 or Oct. 12, of $64,203.67 equals		53,503.06	$ 64,074.50
Net adjustment as above			$ 17,433.55

SCHEDULE 7

Explanation of Items Changed.

(1) (2) and (3) Self-explanatory.		
(4) Adjustment to surplus not a deductible item.		
(5) Inventory December 31, 1920 corrected		$274,808.46
Per books		264,671.83
Adjustment		$ 10,136.63

Schedule 7, continued

(6)	Accounts receivable understated		$ 650.74
	Accrued expenses overstated		221.15
	Total		$ 871.89
(7)	Self-explanatory		
(8)	Depreciation corrected:		
	Building December 31, 1919	$10,761.44 at 2%	$ 215.22
	Furniture and Fixtures	11,990.09 at 10%	1,199.01
	Automobiles	16,543.42 at 20%	3,308.68
	Automobiles Additions 1920	3,193.46 at 20%	638.69
	Furniture and fixtures — New Building. Additions 1920	17,683.94 at 2% period	353.68
	Total		$ 5,715.28

Schedule 7, continued

As per books		None
Allowed herein		$ 5,715.28
(9) Merchandise not on books		4,167.29
Insurance accrued		522.05
Total		$ 4,689.34

(10) Self-explanatory.

SCHEDULE 8

Consolidated Net Income - 1921

Income corrected:		
Zellerbach Paper Co. (Schedule 1)	$774,423.89	
National Paper Products Co. (Schedule 3)	355,297.11	
A. S. Hopkins Co. (Schedule 6)	10,700.61	
Total		$1,140,421.61
Losses Corrected:		
The Sanitary Products Co. (Schedule 5)		1,813.51
Consolidated Net Income Corrected		$1,138,608.10

Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 9.

Computation of Invested Capital.

Capital stock		$6,500,000.00
Surplus (a)		4,420,341.33
(b) Goodwill restored		9,192.87
Total		$10,929,534.20
Deductions:		
(c) Patents disallowed	$10,000.00	
(d) Prior years taxes adjusted	496,471.96	
(e) 1920 taxes prorated	255,340.40	
(f) Dividends prorated	73,424.66	
(g) Inadmissibles	685,705.61	
Total (deduct from above)		1,520,942.63
As constructed		$9,408,591.57

Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 10.

Explanations of Items Changed

(a) Surplus April 30, 1919, Schedule 57 (a) letter covering years 1917 to 1920, inclusive		$2,740,477.28
Taxable income Fiscal year April 30, 1920		2,039,940.68
Except interest		8,581.30
Dividends received		$ 16,270.66
Total		$4,805,269.92
Less: Donations	$ 29,178.59	
Dividnds	355,750.00	384,928.59
Surplus April 30, 1920 adjusted		$4,420,341.33

(b) Goodwill restored as agreed in conference of October 25 and 26, 1926.

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Schedule 10, continued

(c) Patents disallowed in conference of above date.

(d) Prior years taxes adjusted:

1915 and 1916 additional taxes			$28,241.18
1917 corrected taxes		$440,728.61	
1918 corrected taxes		255,591.71	
1919 corrected taxes		339,890.37	
Total		$1,036,210.69	
Less paid prior to April 30, 1920:			
1917	$207,041.31		
1918	193,597.92		
1919	167,340.68	567,979.91	468,230.78
Total additional taxes			$496,471.96

Zellerbach Paper Co. Year ended April 30, 1921

Schedule 10, continued

(e)	1920 corrected taxes prorated or $607,797.41 x .417808 equals		$253,942.62
	Period ended Oct. 31, 1920, A. S. Hopkins Company $16,727.43, due as follows:		
	$4,181.86—Jan. 15, 1921—106/365 =	$1,214.46	
	4,181.86—April 15, 1921—16/365 =	183.32	1,397.78
	Total		$255,340.40
(f)	Dividends paid May 31, 1920 prorated or $80,000.00 for 335/365 equals		$73,424.66
(g)	(1) Average inadmissible assets	$896,490.00	
	(2) Average Total assets	13,196,168.78	
	Percentage (1) to (2) .06793		
	$10,094,297.18 x 6.793% equals		$685,705.61

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Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 11.

Computation of Tax, 1921

Excess Profits Tax

Net Income, Schedule 8	$1,138,608.10
Invested capital, Schedule 9 (/12 for part year)	9,408,591.57
8% of invested capital	752,687.33
Plus exemption, $3,000. (/12 for part year)	3,000.00
Total credit	$ 755,687.33

	Income	Credit	Taxable	Rate	Tax
20%	$1,138,608.10	$755,687.33	$382,920.77	20%	$ 76,584.15

Income Tax

Net Income taxable year	$1,138,608.10	
Less: Interest U. S. obligations not exempt	26,800.59	
Excess Profits Tax	76,584.15	
Exemption (8/12 for part year)	1,333.33	
Balance taxable at 10%	1,033,890.03	
Income tax		103,389.00
Total Income and Excess Profits Tax		$179,973.15

Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 12.

Allocation of Total Tax.

Name of Company	Income	Amount
Zellerbach Paper Co.	$ 774,423.89	$122,214.01
National Paper Products Co.	355,297.11	56,070.44
A. S. Hopkins Co.	10,700.61	1,688.70
Total	$1,140,421.61	$179,973.15

BHB-3 [33]

SCHEDULE 13.

Computation of Tax 1921

National Paper Products Company.

Total tax liability allocated Schedule 12		$ 56,070.44
Previously assessed: Account #400,016 July 1921 Consolidated return	$ 83,118.56	
Less: Allocated to Zellerbach Paper Company on basis of income reported	58,189.64	24,928.92
Additional tax		$ 31,141.52

Zellerbach Paper Co. — Year ended April 30, 1921

SCHEDULE 14.

Computation of Tax 1921

A. S. Hopkins Company.

Total tax liability, allocated, Schedule 12		$ 1,688.70
Previously assessed		None
Additional tax		$ 1,688.70

SCHEDULE 15.

Computation of Tax 1921

Total tax liability allocated, Schedule 12		$122,214.01
Previously assessed: Account #400,016		
July 1921 Consolidated return —	$ 83,118.56	
Less: Allocated to National Paper Products Company on basis of income reported	24,928.92	58,189.64
Additional tax		$ 64,024.37

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Zellerbach Paper Company.

EXHIB IT A-1

Depreciation

Rate agreed to in conference
of October 25 and 26, 1927.

NOTE: Additions for fiscal years ended April 30, 1920 and 1921 include all branches of Zellerbach Paper Company.

Buildings (Rate 2%)	Cost	April 30, 1921
April 30, 1916 Balance	$326,935.15	$ 6,538.70
April 30, 1918 Additions	4,352.74	87.05
April 30, 1920 Additions	39.00	78
April 30, 1921 Additions	86,685.35	866.85
December 31, 1920 Additions (A. S. Hopkins transfer)	10,761.44	71.74
Totals	$428,773.68	$ 7,565.12
Fixtures and Machinery (Rate 8%)		
April 30, 1916 Balance	$102,981.97	$ 8,238.56
April 30, 1917 Reductions	(14,592.78)	(1,167.42)
April 30, 1918 Additions	13,706.04	1,096.48

Zellerbach Paper Company.

Exhibit A-1, continued

April 30, 1919 Additions	15,113.70	1,209.10
April 30, 1920 Additions	15,152.65	1,212.21
April 30, 1921 Additions	29,605.97	1,184.24
Dec. 31, 1920 Additions (A. S. Hopkins transfer)	28,924.03	771.31
Totals	$190,891.58	$ 12,544.48
Automobiles Rate 20%		
April 30, 1916 Balance	$ 41,951.85	$ 8,390.37
April 30, 1917 Additions	5,517.50	1,103.50
April 30, 1918 Additions	5,335.70	1,067.14
April 30, 1919 Additions	10,682.09	2,136.42
April 30, 1920 Additions	27,864.27	5,572.85
April 30, 1921 Additions	36,518.84	3,651.88
Dec. 31, 1920 Additions (A. S. Hopkins transfer)	14,483.68	965.58
Totals	$142,353.93	$ 22,887.74

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Zellerbach Paper Company.
Pacific Paper Company.

EXHIBIT A-2

Depreciation

Fixtures and Machinery Rate 8%	Cost	April 30, 1921
April 30, 1916 Balance	$ 19,354.60	$ 1,548.37
April 30, 1917 Additions	3,353.70	268.30
April 30, 1918 Additions	301.22	24.10
April 30, 1919 Additions	4,343.43	347.47
April 30, 1920 Included in Exhibit A-1		
Totals	$ 27,352.95	$ 2,188.24
Automobiles — Rate 20%		
April 30, 1916 Balance	$ 13,179.37	$ 2,635.87
April 30, 1917 Additions	981.30	196.26
April 30, 1918 Additions	1,418.91	283.78
April 30, 1919 Additions	1,997.25	399.45
Totals	$ 17,576.83	$ 3,515.36

Zellerbach Paper Company.
Pacific Paper Company.

EXHIBIT A-3

Fixtures and Machinery Rate 8%		
April 30, 1916 Balance	$ 14,030.36	$ 1,122.43
April 30, 1917 Additions	3,729.47	298.36
April 30, 1918 Additions	1,636.42	130.91
April 30, 1919 Additions	2,343.18	187.45
April 30, 1920 Included in Exhibit A-1		
Totals	$ 21,739.43	$ 1,739.15
Automobiles Rate 20%		
April 30, 1916 Balance	$ 6,995.79	$ 1,399.16
April 30, 1917 Additions	3,246.13	649.23
April 30, 1918 Additions	1,007.31	201.46
April 30, 1919 Additions	5,638.39	1,127.68
April 30, 1920 Included in Exhibit A-1		
Totals	$ 16,887.62	$ 3,377.53

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[36]

Zellerbach Paper Company.
Lambert Paper Company.

EXHIBIT A-4
Depreciation

	Cost	April 30, 1921
January 1, 1917 Fixtures and Machinery	$5,788.45	$463.08
April 30, 1917 Additions Net	255.70	20.46
April 30, 1918 Additions Net	1,468.20	117.46
April 30, 1919 Additions Net	1,131.73	90.54
April 30, 1920 Included in Exhibit A-1		
Totals	$8,644.08	$691.54
Rate 20%		
Jan. 1, 1917 Automobiles	$1,970.00	$394.00
April 30, 1917 Additions Net	469.00	93.80
April 30, 1918 Additions Net	570.75	114.15
April 30, 1919 Additions Net	1,216.00	243.20
Totals	$4,225.75	$845.15

EXHIBIT A-5

Machinery and Equipment Rate 8%		
National Paper Products Company		
April 30, 1919 Balance	$ 654.22	$ 52.34

EXHIBIT A-6

Recapitulation

	April 30, 1921
A-1 Buildings	$7,565.12
Fixtures and Machinery	$12,544.48
Automibiles	22,887.74
A-2 Fixtures and Machinery	2,188.24
Automobiles	3,515.36
A-3 Fixtures & Machinery	1,739.15
Automobiles	3,377.53
A-4 Fixtures & Machinery	691.54
Automobiles	845.15
A-5 Machinery & Equipment	52.34
Total	$55,406.65

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[Endorsed] United States Board of Tax Appeals. Filed July 9, 1928. [37]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2. Admits the allegations in paragraphs 1 and 2.

3. Admits the allegations in paragraph 3, except that he says the deficiencies therein stated have not been assessed.

5. Admits that the petitioner, the Zellerbach Paper Company, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office at 534 Battery St., San Francisco, California. Admits that after the enactment of the Revenue Act of 1921, the petitioner did not file a return for the fiscal year ended April 30, 1921. Admits that in determining the deficiencies set forth in 60-day letter dated May 11, 1928, the Commissioner disallowed certain alleged inventory and bad debt adjustments and did not recognize any value as attaching to certain patents. Denies the remaining allegations in paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the petition be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

7/27/28

[Endorsed]: United States Board of Tax Appeals. Filed Aug. 7, 1928. [38]

[Title of Court and Cause.]

MOTION TO FILE AMENDED PETITION

Now comes ZELLERBACH PAPER COMPANY, Petitioner above named, by John Francis Neylan, Esquire, its Counsel, and moves the Board for leave to file an amended petition, same being attached hereto.

JOHN FRANCIS NEYLAN
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed March 13, 1931. [39]

[Title of Court and Cause.]

AMENDED PETITION.

Now comes the above named petitioner and amends its petition heretofore filed in the above entitled matter on the 9th day of July, 1928, said amended petition being prepared and filed in accordance with a stipulation entered into by and between the petitioner and the respondent by their respective counsel, and filed with the Clerk of the Board of Tax Appeals at Washington, D. C., on the 10th day of February, 1931, a copy of which is attached hereto and made a part hereof.

Said petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:D60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. Petitioner is a corporation organized under the laws of the State of California, and having its principal office and place of business at 534 Battery Street, San Francisco, California. [40]

2. The notice of deficiency, a copy of which is attached to the original petition filed herein, and marked Exhibit "A," and which is incorporated herein by reference thereto, was mailed to the petitioner on May 11, 1928.

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and the amount in controversy as per the notice of deficiency, was the sum of $64,024.37, which, however, has been altered by stipulation of counsel, a

copy of which is attached hereto and made a part hereof, and is now the sum of $69,114.02.

The deficiency of $64,024.37 as set forth in the notice of deficiency is a portion of a total deficiency of $96,854.59, assessed by the Commissioner of Internal Revenue against Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Co. (subsidiary)	31,141.52
A. S. Hopkins Co. (Zellerbach Paper Company as Transferee)	1,688.70
Total deficiency	$96,854.59

The petitioner herein alleges that by reason of those certain stipulations filed in this matter, and in the matter of National Paper Products Co., petitioner, versus Commissioner of Internal Revenue, respondent, Docket No. 39,715, and in the matter of Zellerbach Paper Company, Transferee of A. S. Hopkins Co., petitioner, versus, Commissioner of Internal Revenue, respondent, Docket No. 39,704, the amounts now due from the respective taxpayers are as follows: [41]

Zellerbach Paper Company	$69,114.02
National Paper Products Co.	32,990.18
Zellerbach Paper Co. as Transferee of A. S. Hopkins Co.	1,744.37

Provided, however, that the Statute of Limitations

does not bar the right of the respondent herein to collect the amounts as hereinabove set forth.

The petitioner alleges therefore that the various items in controversy as set forth in the original petition filed herein have now been adjusted and agreed upon by and between the parties hereto, save and excepting the question as to whether or not the Statute of Limitations bars the right of the respondent herein to collect said additional taxes or any part of same.

4. Petitioner also alleges that the invested capital of the taxpayer for the fiscal year ended April 30, 1921, cannot be determined until it shall have been finally decided whether Zellerbach Paper Company (petitioner herein) shall be compelled to pay additional taxes for the fiscal year ended April 30, 1919, in the sum of $137,519.64, and the fiscal year ended April 30, 1920, in the sum of $36,540.10, which matter is now in issue in that certain proceeding pending before the United States Board of Tax Appeals and entitled Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 35599, it being the contention of the said Zellerbach Paper Company that the collection of said taxes for the two fiscal years hereinabove referred to, is barred by the Statute of Limitations. [42]

5. Petitioner also alleges that it is entitled to have considered herein the matter of a certain claim for refund in the sum of $5,127.29 filed by Zellerbach Paper Company as transferee of A. S. Hopkins Co., with the Collector of Internal Revenue at

San Francisco, California, on June 6th, 1928, which claim was thereafter forwarded to the respondent herein, and which claim for refund of taxes illegally collected has not as yet been determined or passed upon by the said respondent.

Additional facts in connection with the question of the invested capital of the petitioner for the fiscal year ended April 30, 1920; and additional facts in connection with said claim for refund will be hereafter set forth in detail.

6. The determination of the tax set forth in the hereinabove mentioned notice of deficiency in the sum of $64,024.37, and the determination of the tax thereafter by the respondent herein, in the sum of $69,114.02, is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his sixty day letter dated May 11th, 1928, and in his later determination as hereinabove set forth, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, by reason of the fact that the assessment of any additional tax for said fiscal year was and is barred by Sections 250(d) of the Revenue [43] Act of 1918, 250(d)(1) of the Revenue Act of 1921, Section 277(a)(1) and Section 277(a)(2) of the Revenue Act of 1924, and Section 277(a)(2), Section 277(a)(3) and Section 1106(a) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928.

(b) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred in proceeding upon

the theory that inasmuch as the petitioner had filed its income tax return under the Revenue Act of 1918, but no additional return was filed by the petitioner under the Revenue Act of 1921, no Statute of Limitation applies.

(c) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred by ruling that an additional return was necessary under the Revenue Act of 1921, inasmuch as there were no items of income or deduction in the consolidated return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921.

(d) The Commissioner erred in failing to include as a part of the invested capital of the petitioner for the fiscal year ended April 30, 1921, the sum of $137,519.64 claimed by the Commissioner herein to be due as additional taxes for the fiscal year ended April 30, 1919; and erred in failing to [44] include in the invested capital of the petitioner for the fiscal year ended April 30, 1921, the proper pro rata portion of the sum of $36,540.10 claimed as additional taxes due from the petitioner for the fiscal year ended April 30, 1920. Petitioner alleges in connection therewith that it was not and is not liable for either the sum of $137,519.64 or the sum of $36,540.10, or any part of said sums for the fiscal years ended April 30, 1919, and April 30, 1920, on the ground that the claims of the Com-

missioner of Internal Revenue for said sums are barred by the Statute of Limitations, all as more fully set forth in that certain proceeding pending before the United States Board of Tax Appeals being entitled Zellerbach Paper Company vs. Commissioner of Internal Revenue, Docket No. 35599.

7. The Commissioner erred in including in the income of petitioner herein for the fiscal year ended April 30, 1921, the sum of $10,700.61, which represented two-twelfths of the adjusted net taxable income of A. S. Hopkins Co. for the calendar year 1920, and in failing to reduce the deficiency claimed against this petitioner for said fiscal year in the sum of $5,127.29, all as more fully set forth in that certain claim for refund of taxes illegally collected, filed by Zellerbach Paper Company as Transferee of A. S. Hopkins Co. with the Collector of Internal Revenue at San Francisco, California, on June 6, 1928.

8. The facts upon which the petitioner relies as the basis of this proceeding, are as follows: [45]

(a) Petitioner herein filed its income tax return for the fiscal year ended April 30, 1921, on July 16, 1921, as evidenced by the stipulation filed herein, a copy of which is attached hereto, which return was neither false nor fraudulent. This return was filed under the Revenue Act of 1918, which was in effect until the adoption of the Revenue Act of 1921 on November 23, 1921.

(b) Under the Revenue Act of 1918 any additional assessment was required to be made within five years after the date of the filing of the return. This is provided in Section 250(d) of the Revenue Act of 1918, and carried forward under Section 250(d)(1) of the Revenue Act of 1921, Section 277(a)(2) of the Revenue Act of 1924, Section 277(a)(3) of the Revenue Act of 1926, and Section (1) of the Revenue Act of 1928. The Revenue Act of 1921 provided that any assessment of any additional taxes for the taxable year 1921, or succeeding taxable years, should be determined and assessed by the Commissioner within four years after the return was filed. This was carried forward under Section 277(a)(1) of the Revenue Act of 1924, Section 277(a)(2) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928. The return herein, as hereinabove set forth, was filed on the 16th day of July, 1921, and under the Revenue Act of 1918 any additional assessment would necessarily have to be made on or before July 15, 1926, and under the [46] Revenue Act of 1921 any additional assessment would have to be made on or before the 15th day of July, 1925.

(c) The paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the Petitioner and Respondent, and attached to the stipulation filed herein, and marked Exhibit "A," could not, under any circumstances, extend the time for the making of any addi-

tional assessment beyond December 31, 1925. No assessment has ever been made against the Petitioner herein for additional taxes for the fiscal year ended April 30, 1921, and the deficiency notice was not mailed to the petitioner until May 11, 1928.

(d) It will not be contended herein that any additional tax became due, and it is a fact that no additional tax became due by reason of the adoption of the Revenue Act of 1921, by reason of any change in the basis for the computation of gross income, or the basis for deductions in arriving at net income, and no additional information that could possibly have been furnished by the taxpayer herein would have changed the method of computing the tax due, or would have changed the amount of tax due under the return as filed. The only change made by reason of the adoption of the Revenue Act of 1921 was to eliminate the $2,000.00 exemption allowed to this Petitioner under the Revenue Act of 1918 (or the proper [47] pro rata thereof, the petitioner having filed a consolidated return), and it therefore became the duty of the Commissioner under Section 250(b) of the Revenue Act of 1921 to examine the return, and to compute the tax due thereunder. That by reason of this fact the return filed by the petitioner herein on July 16, 1921, under the Revenue Act of 1918, constituted and became a return under the Revenue Act of 1921, adopted on November 23, 1921, and which became retroactive as of January 1st, 1921; that upon the adoption of the

Revenue Act of 1921, it became the duty of the Commissioner to compute the tax due from this petitioner, or to recompute said tax, if necessary, and to advise the taxpayer in relation thereto.

(e) The facts in relation to the invested capital of the petitioner for the fiscal year ended April 30, 1921, are as follows: There is now pending before the United States Board of Tax Appeals the matter of Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket Number 35599, and involving amongst other matters the question as to whether the said Zellerbach Paper Company is liable for additional taxes in the sum of $137,519.64 for the fiscal year ended April 30, 1919, and the additional sum of $36,-540.10 for the fiscal year ended April 30, 1920. It is the contention of the said Zellerbach Paper Company in said proceedings, Docket Number 35599, that the collection of [48] said sums is barred by the Statute of Limitations and the defense of the Statute of Limitations has been interposed in relation to said taxes. In determining the invested capital of the petitioner herein for the fiscal year ended April 30, 1921, the Commissioner of Internal Revenue deducted therefrom the sum of $137,519.53, representing the deficiency claimed for the fiscal year ended April 30, 1919, and the pro rata portion of the sum of $36,540.10 representing the deficiency claimed for the fiscal year ended April 30, 1920,

which latter was based upon the theory that the petitioner would have been required to pay said deficiency claimed for the fiscal year ended April 30, 1920, in four quarterly installments as provided by the Revenue Act of 1918 in effect at that time. If it should be held that the collection of the said sum of $137,519.64 and/or the sum of $36,540.10 is barred by the Statute of Limitations (and it is the contention of the said Zellerbach Paper Company that the collection of both of said sums is so barred) the sum of the said $137,519.64 and the proper pro rata portion of said sum of $36,540.10 should be included in the invested capital of petitioner for the fiscal year ended April 30, 1921.

(f) The facts in relation to the claim for refund filed on behalf of Zellerbach Paper Company as transferee of A. S. Hopkins Co., and in the sum of $5,127.29, are as follows: A. S. Hopkins Co. became affiliated with the petitioner herein as of November 1, 1920. The income of the said A. S. Hopkins Co. for the months of November and December, 1920, in the sum of $10,700.61, was not included in the consolidated income tax return of the petitioner herein for the fiscal year ended April 30, 1921, but was added thereto by the Commissioner. Income and profits taxes on [49] said income for said months of November and December, 1920, were assessed against the petitioner herein as per the Treasury Department letter dated December 28, 1927 (IT:CR:C-CAM). Income

and profits taxes on the same income had previously been assessed against the A. S. Hopkins Co. and said taxes were paid under protest by Zellerbach Paper Company as Transferee, on August 17, 1926. The amount so paid was $5,127.29. Petitioner herein, in conferences with the Commissioner of Internal Revenue, sought to have the said income for the months of November and December, 1920, eliminated from taxable income for the fiscal year ended April 30, 1921, on the ground that taxes had been paid on said income on August 17, 1926, as hereinabove set forth. The Commissioner ruled that the income was properly included in the consolidated return of this taxpayer for the fiscal year ended April 30, 1921, and invited and directed the A. S. Hopkins Co. (Zellerbach Paper Company transferee) to file a claim for refund of said sum of $5,127.29. The Treasury Department letter directing the filing of said claim for refund was dated May 3, 1928 (IT: CR-D-CAM) and was addressed to A. S. Hopkins Co., Zellerbach Paper Co. (Transferee), 534 Battery Street, San Francisco, California. Acting in accordance with said letter, a claim for refund was filed on June 6, 1928, with the Collector of Internal Revenue at San Francisco, California, by A. S. Hopkins Co., Zellerbach Paper Co., Transferee. The petitioner herein [50] on January 15, 1930, addressed the Commissioner of Internal Revenue at Washington, D. C., making inquiry as to the disposition

of said claim for refund, and received a reply from said Commissioner under date of January 24, 1930, stating that the claim was under consideration in the office of General Counsel for the Bureau of Internal Revenue in connection with appeals filed by Zellerbach Paper Company involving the fiscal years ended April 30, 1917, to April 30, 1921, inclusive, and stating further, that the Commissioner was unable to advise when action on said claim would be taken.

It is the contention of this petitioner that the income of the A. S. Hopkins Co. for the months of November and December 1920 has already been subjected to tax, and the taxes paid thereon. It is the contention of the said Zellerbach Paper Company that inasmuch as it has absorbed the said A. S. Hopkins Co. the said Zellerbach Paper Company is the real party in interest as evidenced by the fact that the said Zellerbach Paper Company has already paid the tax on said income in the sum of $5,127.29. It is the contention of the petitioner that said claim for refund should have been heretofore allowed, and the amount with interest thereon should have been refunded. In view of the fact that the respondent herein has advised the petitioner that the said claim for refund is in the hands of General Counsel for the Bureau of Internal Revenue in connection with this appeal, the [51] matter should be here adjusted and the Commissioner should be ordered and directed to allow said claim for refund, or the

appropriate reduction in the tax claimed herein, if it should be held that the Statute of Limitations is not a defense, should be made.

9. WHEREFORE PETITIONER PRAYS that upon an answer being filed by the respondent herein a hearing may be had upon the issues involved, and that upon said hearing the Board find

(a) That the petitioner herein filed its income and profits tax return for the fiscal year ended April 30, 1921, on the 16th day of July, 1921, and that said return was neither false nor fraudulent. That said consolidated return contained all items of income and all deductible items, and, further, that said consolidated return contained all other information required by law to be included in its return, and that at the time of the filing of said return the tax due on the net income of the petitioner was correctly computed.

(b) That the Revenue Act of 1921, adopted on the 23rd day of November, 1921, contained no provision making it necessary for the petitioner herein to file a new consolidated or other return, and, further, that the only change in said act consisted in eliminating the $2,000.00 exemption (or the proper pro rata of same), to which this petitioner was entitled under the Revenue Act of 1918, and that it thereupon became the duty of the respondent [52] herein, under Section 250(b) of the Act of 1921, to compute or to recompute the tax due by reason

of the elimination of the exemption as hereinabove set forth, and to notify the taxpayer in relation thereto.

(c) That the return filed by the petitioner herein on July 16, 1921, and while the Revenue Act of 1918 was in force, constituted and became a valid return under the Revenue Act of 1921, and that it was unnecessary on the part of this petitioner to file a new or additional return after the adoption of the Revenue Act of 1921.

(d) That under the Revenue Act of 1918 in effect at the time the return was filed herein, the Commissioner was required to make any additional assessment of taxes claimed within five years after the date of the filing of the return; that under the Revenue Act of 1921 it became necessary for the Commissioner to make any additional assessment within four years after the return of the petitioner herein was filed. That no additional assessment was made within the time required by either the Revenue Act of 1918 or the Revenue Act of 1921. That no proceedings were instituted for the collection of any additional taxes within the statutory period, and that the notice of deficiency was not forwarded to the petitioner herein until May 11, 1928. That the time within which any additional assessment might be made against this taxpayer was not extended beyond December 31, 1925, and that by reason of these facts the right of the respondent herein to

assess and/or collect any [53] additional taxes from the petitioner herein was and is barred by the Statute of Limitations. Further, that whatever liability existed, if any, at the time of the adoption of the Revenue Act of 1926, said liability was completely extinguished by reason of the provisions of Section 1106(a) of said Revenue Act of 1926.

(e) That if it should be held that the Statute of Limitations does not bar the right of the respondent to collect additional taxes for the fiscal year ended April 30, 1921, that the invested capital of the petitioner for said fiscal year, be adjusted in accordance with the final decision as to the collectibility of any additional taxes from the said Zellerbach Paper Company for the fiscal year ended April 30, 1919, and for the fiscal year ended April 30, 1920, which issues are involved in that certain proceeding entitled Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, pending before the United States Board of Tax Appeals, Docket Number 35599.

(f) That if it should be held in this proceeding that the collection of the deficiency agreed upon is not barred by the Statute of Limitations, that the Board find that inasmuch as the sum of $10,700.61 has already been subjected to tax, and the tax paid thereon, that credit be allowed to this petitioner in this proceeding in the sum of $5,127.29, said amount representing the overpayment heretofore made by Zeller-

bach Paper Company, as transferee [54] of A. S. Hopkins Co., all as hereinabove set forth.

(g) That such other and further relief be granted as may be meet and proper in the premises.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California. [55]

State of California,
City and County of San Francisco.—ss.

M. R. Higgins, being duly sworn, says that he is the Vice-President of the Zellerbach Paper Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

M. R. HIGGINS.

Subscribed and sworn to before me this 6th day of March, 1931.

[Seal] LULU A. GODSIL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1931. [56]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the facts herein agreed to may be considered as true by the United States Board of Tax Appeals for the purpose of determining the issues involved in this appeal.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921, the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed [57] by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of

1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

JOHN FRANCIS NEYLAN
Attorney for Petitioner.

C. M. CHAREST
General Counsel,
Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed March 13, 1931. [58]

[Title of Court and Cause.]

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Rev-

enue, for answer to the amended petition filed by the above-named petitioner, admits and denies as follows:

(A). Denies all the material allegations contained in the first unnumbered paragraph of the amended petition.

(B). Admits all the material allegations contained in the second unnumbered paragraph of the amended petition.

1. Admits all the material allegations contained in paragraph numbered 1 of the amended petition.

2. Admits all the material allegations contained in paragraph numbered 2 of the amended petition.

3. Denies all the material allegations contained in paragraph numbered 3 of the amended petition, except the following allegations which are admitted:

That the taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921; that the deficiency in tax for the fiscal year ended April 30, 1921, if not barred by the statute of limitations, is $69,114.02, which amount is the same as the amount shown [59] in stipulation signed on behalf of the petitioner and the respondent and filed with the Board February 10, 1931; and that the only issue before the Board for decision is whether the deficiency is barred by the statute of limitations.

4. Denies all the material allegations contained in paragraph numbered 4 of the amended petition.

5. Denies all the material allegations contained in paragraph numbered 5 of the amended petition.

6. Denies all the material allegations contained in

paragraph numbered 6 of the amended petition.

7. Denies all the material allegations contained in paragraph numbered 7 of the amended petition.

8. Denies all the material allegations contained in paragraph numbered 8 of the amended petition, except such facts as may be alleged in the amended petition which are set forth in a stipulation filed with the Board February 10, 1931.

9. Denies generally and specifically each and every allegation in the petitioner's amended petition contained not hereinbefore admitted, qualified or denied.

(signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed May 12, 1931. [60]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the facts herein agreed to may be considered as true by the United States Board of Tax Appeals for the purpose of determin-

ing the issues involved in this appeal.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed [61] by the petitioner under the Revenue Act of 1916 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency

letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

(Sgd) JOHN FRANCIS NEYLAN
Attorney for Petitioner.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent. [62]

(510M) Docket No. 39701

EXHIBIT A

IT:EN:T-:WR February 27th, 1925

INCOME AND PROFITS TAX WAIVER

(For taxable years ended prior to March 1, 1921.)

Received
R.A.D.
Mar 6 - 1925
Engineering Division

In pursuance of the provisions of existing Internal Revenue Laws Zellerbach Paper Company, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or

on behalf of said taxpayer for the fiscal year ended April 30, 1921, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Attest

[Seal] ZELLERBACH PAPER COMPANY

Taxpayer

By I. ZELLERBACH, Pres.

President

A. Van Der ZWIEP,

Secretary

D. H. BLAIR,

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [63]

[Endorsed]: United States Board of Tax Appeals. Filed Feb. 10, 1931. [63]

A true copy. Teste.

[Seal] B. D. GAMBLE

Clerk U. S. Board of Tax Appeals.

[Title of Court and Causes Nos. 39701, 39704, 39715.]

FINDINGS OF FACT AND OPINION.

Promulgated May 17, 1932.

The only return filed for the fiscal year ended April 30, 1921 was one filed July 16, 1921. A credit of $2,000 was taken in this return as allowed by the Revenue Act of 1918. Thereafter the Revenue Act of 1921 was approved under which the taxpayer owed additional tax since it was not entitled to the full credit of $2,000. Held, that the return filed did not start the statutory period of limitations.

John Francis Neylan, Esq., for the petitioners.

H. A. Cox, Esq., and F. R. Shearer, Esq., for the respondent.

The Commissioner determined a deficiency in the income tax liability of Zellerbach Paper Company for the fiscal year ended April 30, 1921. He also determined a deficiency in the liability of National Paper Products Company for the same period. He determined, further, that Zellerbach Paper Company was liable as transferee of the A. S. Hopkins Company for a deficiency in that company's tax liability for the period November 1, 1920, to April 30, 1921. The parties have stipulated the correct amount of the deficiency in each case, and the only question in controversy is whether or not the deficiencies are barred by the statute of limitations. [64]

FINDINGS OF FACT.

The parties entered into the following stipulations

Docket No. 39701 Zellerbach Paper Company

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and

the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

Docket No. 39715 National Paper Products Co.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$57,919.10
Tax assessed (allocated)	24,928.92
Deficiency in tax if not barred by the statute of limitations	$32,990.18

[65]

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $200,000. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921

this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $300,000.00

[The two exhibits A mentioned in the above stipulations each waive the time for making assessment of taxes due for the fiscal year ended April 30, 1921 until December 31, 1925.]

Docket No. 39704 Zellerbach Paper Company, Transferee of A. S. Hopkins Co.

The liability for federal income and profits taxes for the period from November 1, 1920 to April 30, 1921, of A. S. Hopkins Company, dissolved, is as shown below:

Correct tax	$1,744.37
Tax assessed	none
Deficiency in tax if not barred by the statute of limitations	$1,744.37

together with statutory interest thereon to the date of payment. [66]

It is further stipulated and agreed that the aforesaid deficiency in tax and interest for the period ended April 30, 1921, is now due from this petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, unless the collection of said tax is now barred by the statute of limitations. Should the Board find that the collection of the said tax is not barred by the statute of limitations the Board may enter an order finding that in law and in equity there is a deficiency in federal income and profits taxes for the period ended April 30, 1921 in the amount of $1,744.37, together with statutory interest thereon to date of payment, due from the petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, a dissolved corporation.

A. S. Hopkins Company was affiliated with the Zellerbach Paper Company, the National Paper Products Company and the Sanitary Products Corporation during the period from November 1, 1920 to April 30, 1921, under the provisions of Section 240 of the Revenue Acts of 1918 and 1921. The Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) kept their books on the basis of the fiscal year ended April 30, 1921 and filed their return on the basis of the fiscal year ended April 30, 1921. On March 15, 1921, Zellerbach Paper Company designated itself, Zellerbach Paper Com-

pany, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920. The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) under the provisions of the Revenue Act of 1918 covering the fiscal year ended April 30, 1921, which return disclosed a net income in excess of $700,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921, was filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation or the A. S. Hopkins Company (subsidiaries). No returns other than those referred to in this stipulation covering the fiscal year ended April 30, 1921 or any portion thereof, have been fied by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation and A. S. Hopkins Company (subsidiaries. [67]

The said return filed by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) (in which was included the income of the A. S. Hopkins Company earned subsequent to

December 31, 1920 to April 30, 1921) properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 the said affiliated companies would be entitled to no such exemption for the fiscal year ended April 30, 1921.

The deficiency letter from which this appeal was taken, covering the period from November 1, 1920 to April 30, 1921, was mailed to the petitioner on May 11, 1928 and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the said affiliated companies referred to herein for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy is in excess of $1,000,000.

The A. S. Hopkins Company maintained its own set of books and records until December 31, 1920. Thereafter, it maintained no separate set of books, and its operations were mingled with those of Zellerbach Paper Company as if it were a branch of the latter company.

On the return for the A. S. Hopkins Company for the calendar year 1920, at page 3, the following question and answer appears:

> 12. Is over 50 per cent of your outstanding voting capital stock owned by another corporation or by two or more corporations that are affiliated?
>
> The entire capital stock of this Corporation has been bought by the Zellerbach Paper Co. and its entire net assets transferred as of December 31, 1920.

Since the answer to question 12 was in the affirmative, question 14 should have been answered. A proper answer to this question would have shown how the situation changed during the year. This information was not furnished. In the affidavit on this return it was stated to be a return made pursuant to the Revenue Act of 1918. [68]

On the return for the fiscal year ended April 30, 1921 there is no answer to the question "Is this a consolidated return", but the names of the following companies appear at the head of the return: Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation. Questions 11, 12, and 13 were not answered. In question 14, pertaining to affiliations with other corporations, the following question was answered "Yes":

> Did substantially the same conditions as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920?

In the schedules attached to this return, information and figures pertaining to each of the three separate companies above named were set out but no separate information or figures appear in the return pertaining to the A. S. Hopkins Company. This return did not in any way indicate that the A. S. Hopkins Company was one of the affiliated companies for which the return was made nor in any way inform the Commissioner that its income was included in the return. The statement appears in the affidavit supporting this return that it is a return made pursuant to the Revenue Act of 1918.

OPINION.

MURDOCK: The Board has consistently held in situations like the one here present, that a return filed pursuant to the Revenue Act of 1918 is not sufficient to start the period of limitation. The first case of this kind was C. A. Lawton Company, 13 B. T. A. 8, where the Board cited John Wanamaker, Philadelphia, 8 B. T. A. 864, in which a somewhat similar question had been discussed. The other decisions are Hutchinson Company, 14 B. T. A. 367; Valentine-Clark Company, 14 B. T. A. 562 [reversed 52 Fed. (2d) 346]; Gus Holstine Dry Goods Company, 16 B. T. A. [69] 1124; Isaac Goldmann Company, 17 B. T. A. 1103 [reversed 51 Fed. (2d) 427]; Myles Salt Company, Ltd., 18 B. T. A. 742; [reversed 49 Fed. (2d) 232]; Adams, Cushing & Foster, Inc., 19 B. T. A. 89; G. Corrado Coal and Coke Interests, Inc., 19 B. T. A. 691; and E. J. Lorie, et al., 21 B. T. A. 612. Cf. Hill Goldwater, 21 B. T. A. 73, and particularly National Paper Products Company, et al., 26 B. T. A. ..... The Board's reasons for its position are fully set forth in the above opinions and need not be repeated here. Those decisions are supported by Updike v. United States, 8 Fed. (2d) 913. With all due respect to the Courts of Appeal which have reversed the Board, we adhere to our original position because we still feel that it is the correct one.

The Commissioner would support his determination in these cases on another ground. The A. S. Hopkins Company was affiliated with the other companies from November 1, 1920 until the end of the

fiscal period April 30, 1921. The Commissioner contends that its income was never properly reported for this period since its income for November and December, 1920, was reported in a separate return, and its income from January 1, 1921 to April 30, 1921, was included in that of Zellerbach Paper Company without even disclosing that it was so included and without setting forth separately its income and deductions from those of the Zellerbach Paper Company. He cites Commissioner v. Colmer-Green Lumber Company, 49 Fed. (2d) 234 in support of his contention that the statute has not barred him from proceeding further against the Zellerbach Paper Company as a taxpayer and also as a transferee of the assets of A. S. Hopkins Company. The case cited may not be distinguishable from the present case in this connection, but the Board has consistently held that no such segregation in the return is necessary to start the running of the period of limitations. Its [70] first decision to this effect has been affirmed by the Circuit Court of Appeals for the Third Circuit. Stetson & Ellison, 11 B. T. A. 397, affirmed 43 Fed. (2d) 553. See also Peerless Iron Pipe Exchange, Inc., 23 B. T. A. 900.

Reviewed by the Board.

Judgment will be entered under Rule 50.

VAN FOSSAN, dissenting: I am unable to agree with the prevailing opinion in these cases. The conclusions of the Board have been tested by appeal to the courts on three occasions and in each case the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Gold-

mann Co., 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. I believe the position taken by the Board in these and like cases has been erroneous and that in the instant case the petitioners should prevail.

MARQUETTE agrees with this dissent. [71]

[Title of Court and Cause.]

MOTION.

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in pursuance to the Board's interlocutory decision dated May 17, 1932, and moves that the Board find the deficiencies in respect to the above-named petitioners in the following amounts:

Docket No.	Name	Amount	Year
39701	Zellerbach Paper Co.	$69,114.02	Fiscal Year April 30, 1921
39704	Zellerbach Paper Co. Transferee of A. S. Hopkins Co.	$ 1,744.37	Period Nov. 1, 1920 to April 30, 1921.
39715	National Paper Products Company	$32,990.18	Fiscal Year April 30, 1921

inasmuch as the Board's decision does not alter the deficiencies as agreed upon in the stipulation of facts heretofore filed in these proceedings.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals.
Filed May 31, 1932. [72]

[Title of Court and Cause.]

NOTICE UNDER RULE 50.

TAKE NOTICE that the Respondent in the above-entitled proceeding filed with the Board on May 31, 1932, a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 9.30 a. m. on June 29, 1932, before a Division of the Board at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquiescence to the entry of a decision based on such computation shall have been filed with the Board.

No further notice of said hearing will be sent.

B. D. GAMBLE,
Clerk.

To: John Francis Neylan, Esq.,
Crocker First National Bank Bldg.,
San Francisco, California. [73]

United States Board of Tax Appeals

Docket No. 39701

ZELLERBACH PAPER COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion promulgated May 17, 1932, the respondent, on May 31, 1932 having filed a motion to find the deficiency in the amount agreed upon in the stipulation of facts, and no objection to said motion having been made by the petitioner, after due notice thereof, it is

ORDERED and DECIDED that there is a deficiency for the fiscal year ended April 30, 1921 in the amount of $69,114.02.

[Seal] (Signed) LOGAN MORRIS,
Member,
United States Board of Tax Appeals.

Enter:

[Endorsed]: Entered Jul. 9, 1932. [74]

[Title of Court and Cause.]

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Zellerbach Paper Company, by its attorneys, Messrs. John Francis Neylan and J. Paul Miller, and respectfully shows:

I.

Jurisdiction for Review.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision rendered in the above entitled matter by the United States Board of Tax Appeals, entered on the 9th day of July, 1932, redetermining a deficiency in income and profits taxes for the fiscal year ending April 30, 1921, against the above Petitioner, in the sum of $69,114.02. [75]

This Petition for Review is filed in pursuance of the provisions of Section 1001 of the Act of Congress approved on the 26th day of February, 1926, as amended by the Revenue Act of 1928 and the Revenue Act of 1932.

II.

Your Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, State of California.

For the fiscal year ending April 30, 1921, Petitioner filed its income and profits tax return on the 16th day of July, 1921, with the Collector of Internal Revenue for the First District of California, whose office was and is located in the City and County of San Francisco, State of California.

III.

Nature of Controversy.

The nature of the controversy is as follows:

On July 16, 1921 Zellerbach Paper Company filed a consolidated income and profits tax return on behalf of itself and its subsidiaries, National Paper Products Company, and Sanitary Products Corporation, with the Collector of Internal Revenue for the First District of California, at San Francisco, California, for the fiscal year ended April 30th, 1921. [76]

This return was filed during the time the Act commonly known as the Revenue Act of 1918 was in effect.

Under the provisions of the Revenue Act of 1918

Under the provisions of the Revenue Act of 1918

in effect at the time the income and profits tax return hereinabove referred to was filed, a corporate taxpayer was allowed an exemption of $2,000.00.

Under the Revenue Act of 1921, which went into effect on November 23, 1921, this exemption was eliminated if the net income of the corporation was in excess of $25,000.00. The income of Zellerbach Paper Company and its subsidiaries for the fiscal year in question was admittedly in excess of $25,000.00 and as a consequence under the 1921 Act, the

Zellerbach Paper Company was not entitled to the exemption of $2,000.00.

The Revenue Act of 1921, which became effective on November 23, 1921, was retroactive as of January 1, 1921 as to certain features thereof. Amongst the retroactive provisions of the Act was the elimination of the $2,000. exemption.

The fiscal year involved herein began May 1, 1920 and ended April 30, 1921. As a result thereof, eight months of the fiscal year fell in the calendar year 1920 and four months fell in the calendar year 1921. The elimination of the $2,000. exemption as hereinabove set forth [77] had the effect of reducing the exemption which the Zellerbach Paper Company was entitled to take in the filing of its return, to the sum of $1,333.34. The tax was increased thereby in the sum of $66.67.

No additional return was filed by the Zellerbach Paper Company for the fiscal year ending April 30, 1921, other than the return hereinabove mentioned.

The statutory period within which the Commissioner of Internal Revenue might make an additional assessment under the Act of 1918 was five years. This period was reduced, under the Revenue Act of 1921, to four years.

Under date of February 27, 1925, the Zellerbach Paper Company executed an "Income and Profits Tax Waiver" extending the time within which the Commissioner of Internal Revenue might make an additional assessment to December 31, 1925. No other waiver was executed.

The deficiency letter, i. e., the so-called sixty day letter, was not issued until May 11, 1928.

An appeal from this sixty day letter was taken to the United States Board of Tax Appeals on the 9th day of July, 1928.

Thereafter, the Commissioner of Internal Revenue filed his Answer to said Petition.

Under date of February 10, 1931, the attorneys for the respective parties filed with the United States Board of Tax Appeals a stipulation wherein it was agreed [78] that the deficiency in tax, if not barred by the Statute of Limitations, amounted to $69,114.02.

On or about the 16th day of March, 1931, the taxpayer, Zellerbach Paper Company, filed with the United States Board of Tax Appeals an amended petition, whereupon the Commissioner of Internal Revenue filed his answer to same.

In the answer to the amended Petition filed by the Commissioner herein, it was admitted "that the only issue before the Board for decision is whether the deficiency is barred by the Statute of Limitations; * * *"

For the purpose of trial before the United States Board of Tax Appeals, the above-captioned case was consolidated with two additional cases, to-wit, Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals Docket Number 39704, and National Paper Products Company, Petitioner, v. Commissioner of

Internal Revenue, Respondent, Board of Tax Appeals Docket Number 39715. A joint opinion was rendered by the United States Board of Tax Appeals, and reported in 26 B. T. A. 96. Separate Petitions for Review are being filed, however, in connection with each of these three cases.

The Board of Tax Appeals in its opinion rendered in these cases, recognizes that the identical question has been determined against the Commissioner in three cases, to-wit: Myles Salt Company v. Commissioner (C. C. A. 5th) [79] 49 Fed. (2) 232; Isaac Goldman Company v. David Burnet (Court of Appeals of District of Columbia) 51 Fed. (2) 427, and Valentine-Clark Company v. Commissioner (C. C. A. 8th) 52 Fed. (2) 346. Despite this fact, the Board of Tax Appeals refuses to follow the rulings of the courts.

Board of Tax Appeals Member Van Fossan dissented from the majority of the Board, holding that the cases decided by the courts above cited are controlling. Board of Tax Appeals Member Marquette agreed with this dissent.

IV.

Assignments of Error.

The Petitioner states that in the record and proceedings before the Board of Tax Appeals, and in the decision and the final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred which intervened to the prejudice of the Petitioner and the Petitioner assigns the following errors, and each of them, which,

it avers, occurred in said record, proceedings, decision and final order of redetermination, and upon which it relies to reverse said decision and final order of redetermination so rendered and returned by the Board of Tax Appeals, to-wit:

(a) The Board of Tax Appeals erred in holding that the collection of the deficiency in question was not barred by the Statute of Limitations;

(b) The Board of Tax Appeals erred in holding that the income and profits tax return for the fiscal year ended April 30, 1921, filed by the Petitioner on the 16th day of [80] July, 1921, under the provisions of the Revenue Act of 1918, did not start the running of the period of limitation.

(c) The Board of Tax Appeals erred in failing to hold that the return filed on the 16th day of July, 1921, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921.

(d) The Board of Tax Appeals erred in holding that the Revenue Act of 1921 required the filing of a new income and profits tax return, which would differ from that filed under the Revenue Act of 1918, only by the elimination of a portion of the $2,000 corporate exemption.

(e) The Board of Tax Appeals erred in finding a deficiency against the Petitioner for the fiscal year ending April 30, 1921, in the sum of $69,114.02.

(f) The Board of Tax Appeals erred in rendering a decision for the Respondent.

WHEREFORE, your Petitioner prays:

(1) That this Honorable Court review the decision of the United States Board of Tax Appeals.

(2) That the transcript of the record be prepared in accordance with the law and with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to the Clerk of said court for filing.

(3) That appropriate action be taken by this Honorable Court to the end that the errors complained of may be reviewed and corrected. [81]

(4) For such other and further relief as to this Honorable Court may seem fit and proper.

ZELLERBACH PAPER COMPANY,
By THOMAS McLAREN.
JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California. [82]

State of California,
City and County of San Francisco.—ss.

Thomas McLaren, being first duly sworn, deposes and says:

That he is the Vice-President of Zellerbach Paper Company, the Petitioner in the above entitled matter; and that as such he had authority to, and did sign the above and foregoing petition; that he

has read the same and knows the contents thereof; that the same is true of his own knowledge, except those matters which are therein alleged on information or belief, and that as to those matters he believes it to be true; that the said petition is filed in good faith, and not for the purpose of delay.

THOMAS McLAREN.

Subscribed and sworn to before me this 1st day of October, 1932.

[Seal] LULU A. GODSIL,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1935.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932. [83]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for Respondent.

PLEASE TAKE NOTICE that the above named Petitioner did, on the 4th day of October, 1932, file with the United States Board of Tax Appeals a Petition for Review of the decision of said Board in the above entitled cause by the United States

Circuit Court of Appeals for the Ninth Circuit, a copy of which said Petition for Review is herewith served upon you.

(Signed) JOHN FRANCIS NEYLAN,
(Signed) J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

Service of the foregoing Notice and service of a copy of the Petition for Review mentioned in said Notice, is hereby accepted this 4th day of October, 1932.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932. [84]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause came on for hearing before The Honorable E. H. Van Fossan, Member of the United States Board of Tax Appeals, on the 10th day of June, 1931, at Oakland, California, there being present the Petitioner, by its Counsel, Messrs. John Francis Neylan and J. Paul Miller, and the Respondent, by its Counsel, Messrs. H. A. Cox and F. R. Shearer (C. M. Charest, Esq., General Counsel).

Thereupon the following proceedings were had and testimony heard by said Member pertaining to the issues involved in the petition for Review filed with the United States Board of Tax Appeals on the 9th day of July, 1928.

Prior to the introduction of testimony, Counsel for petitioner moved for the consolidation of the above-entitled case for the purpose of the hearing with the two additional cases, to-wit, National Paper Products Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals Docket No. 39715, and Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals No. 39704, which motion was granted.

Thereupon attention was called to the desirability of correcting a certain stipulation which had theretofore been filed in case Docket No. 39704 hereinabove referred to, whereupon the following [85] proceedings took place:—

> "Mr. Neylan: Mr. Cox has the language which has been agreed upon.
>
> "Mr. Cox: At the middle of page 2 of that stipulation, the following language or the following sentence is to be stricken out:
>
> 'A. S. Hopkins Company filed its return on March 15, 1921, for the calendar year 1920, and included in said return its income for the months of November and December, 1920.'

In lieu of that sentence there is to be substituted the following sentence:

> 'On March 15, 1921, Zellerbach Paper Company, designated itself, Zellerbach Paper Company, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920.'

Then in the next sentence on the same page an insertion is to be made whereby that sentence, as corrected, will read:

> 'The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent).'

And then continue with the rest of the sentence just as it now stands in the stipulation without further change, the only change being that after the word 'included' in that sentence there is to be inserted the words 'as part of the income of Zellerbach Paper Company'.

"The Member: That is in Docket number 39704.

"Mr. Cox: Yes."

Thereupon Petitioner's Counsel offered in evidence the original [86] Income and Profits Tax Return of the Zellerbach Paper Company, the Na-

tional Paper Products Company, and the Sanitary Products Corporation for the period May 1st, 1920 to the period ended April 30, 1921. In connection with the offer, the following colloquy occurred:

"Mr. Neylan: Now, in relation to the original return in this matter, I assume it is necessary to introduce that in evidence?

"The Member: We have it before us.

"Mr. Neylan: May I ask counsel for the Government if he will agree, without formal proof, that this return which has been handed to me by counsel for the Government is the original return of the Zellerbach Paper Company, the National Paper Products Company, the Sanitary Products Corporation for the period May 1st, 1920, to the period ended April 1st, 1921, and may this be introduced without objection?

"Mr. Cox: May we ask if the signers of the return were officers of all the companies you have named?

"Mr. Neylan: I will have to verify that, Mr. Cox. Mr. Zellerbach, I may say positively, was certainly an officer of the Zellerbach Paper Company, and of National Paper Products.

"The Member: Was he also an officer of Sanitary Products Corporation?

"Mr. Neylan: This is a consolidated return, your Honor.

"Mr. Cox: We agree that this is the original return for whatever it purports to be.

"Mr. Neylan: That is all I want."

The document was received in evidence and marked "Petitioner's Exhibit No. 1." Thereupon Mr. Neylan, counsel for Petitioner, stated: "This is the only return in relation to this matter that this corporation or these corporations ever filed." [87]

Thereupon the following proceedings took place:—

"Mr. Neylan: Your Honor, I would like to ask at this time if the sixty-day letters in each of these matters which are appended to the petition are considered in evidence and as a part of the record, or is it necessary to introduce them in evidence?

"Mr. Cox: We admitted them to be correct in our answer, did we not?

"Mr. Neylan: I think you did.

* * * * * * *

"Mr. Neylan: As I understand, Government counsel at this time agrees that they may be considered in evidence as the correct sixty-day letters, is that correct, Mr. Cox?

"Mr. Cox: Yes, assuming we admitted them.

"Mr. Neylan: Well, subject to that.

"The Member: If you did not admit them, are you now admitting them?

"Mr. Cox: If your Honor will give me a minute I will see whether we did or not. There was a question as to one of them.

"Mr. Neylan: That was in relation to 1925, Mr. Cox?

"Mr. Cox: Yes, they are all three admitted in the answer.

"The Member: Very well."

Thereupon Counsel for Petitioner made his opening statement, and offered some evidence which was received by the Board, after which Counsel for the Respondent offered in evidence the income and profits tax return of the A. S. Hopkins Company which had been filed by Zellerbach Paper Company as successor to A. S. Hopkins Company, and is the return referred to in the Stipulation entered into between the parties in Docket No. 39704, which return was received in evidence [88] and marked "Respondent's Exhibit A."

Thereupon the following proceedings took place:—

"Mr. Cox: The position of the respondent in this case is that an additional return was necessary under the law and under the regulations of Commissioner which were authorized by law; and it is also our position that the return filed did not segregate the income of all the companies; in other words, the income of the Hopkins Company was not segregated from the income of the Zellerbach Company, but they were both included as the income of the Zellerbach Company, and the Board in several cases, as I understand, has sustained the position of the Commissioner on this case.

"The Member: How does this case differ from the Myles Salt case?

"Mr. Cox: This differs from the Myles Salt case in the matter that I have just pointed out, and there are probably other matters. We wish, for the purpose of the brief, to analyze the re-

turn, and call your Honor's attention to such things as we think mark the distinction between the two cases; but there is that one distinction which I have in mind, that the income of the two companies was not segregated, and under the decision of the Circuit Court of Appeals, for the Fifth Circuit, in Robert H. Lucas, Commissioner, v. Colmer Green Lumber Company, decided April 30, 1931, that was made the basis, as I understand it, of that decision.

"The Member: In that case, as I recall, they held there was not a substantial revelation of the facts necessary to determine the income of each of the corporations.

"Mr. Cox: Yes, of each separate company.

"The Member: And, it therefore, did not comply with their understanding of the statute. It was the same circuit that had the Myles Salt case, was it not? [89]

"Mr. Cox: That was the same Circuit, yes.

"The Member: Is there anything else you wish to submit?

"Mr. Cox: Nothing your Honor."

Thereupon the Petitioner introduced the following testimony in rebuttal:

TESTIMONY OF ALONZO WALLACE HELVERN

Alonzo Wallace Helvern being first duly sworn, on direct examination in substance testified as follows:

My name is Alonzo Wallace Helvern; I reside in San Francisco; my profession is that of a public accountant and tax advisor. I have been a public

(Testimony of Alonzo Wallace Helvern.)

accountant for ten years; I am now and for a number of years past have been familiar with tax matters; I have been associated with the accounting firm of Lybrand, Ross Bros. & Montgomery for a period of ten years; I am the manager of the Tax Department of this firm at the present time and have been since January 1, 1928. I have had occasion to examine the original books and records of account of the Zellerbach Paper Company, National Paper Products Company, and the A. S. Hopkins Company, and I am familiar with the income tax returns of these companies. I heard the point made by Counsel for the Government, Mr. Cox, in connection with the segregation of the income of the A. S. Hopkins Company. I am familiar with the facts in relation to the income of the A. S. Hopkins Company and with the accounting records of Zellerbach Paper Company in relation thereto. My information in relation thereto was gathered in the following manner:

Prior to 1925 I was engaged in auditing rather than income tax work, although income tax work was a part of my duties. I was at that time employed by Lybrand, Ross Bros. & Montgomery and had been [90] engaged by them since January, 1921. Part of my work was the auditing of the accounts of Zellerbach Paper Company. In the ordinary course of my duties as an accountant and as an employee of Lybrand, Ross Bros. & Montgomery I came in contact with the accounts of Zellerbach Paper Company; I was engaged as a senior auditor

(Testimony of Alonzo Wallace Helvern.)

in the auditing of those accounts.

In relation to the income of A. S. Hopkins Company, beginning with October, 1920, I found that all of the capital stock of the A. S. Hopkins Company, or approximately all of that capital stock was acquired by Zellerbach Paper Company during the month of October, 1920. I found that Zellerbach Paper Company continued the A. S. Hopkins Company as a subsidiary maintaining its own set of books and records until December 31, 1920. Thereafter, the A. S. Hopkins Company fully controlled by Zellerbach Paper Company, was continued up to the time of its dissolution as a mere branch of Zellerbach Paper Company and had no separate set of books, its operations being mingled and operated entirely by Zellerbach Paper Company as its own branch. It had no set of books after January 1, 1921. There was no segregation of the income or of the expense of the conducting of the A. S. Hopkins Company; such segregation would have been very impractical, and probably impossible. It was merely a part of Zellerbach Paper Company for accounting purposes.

Thereupon the witness was cross-examined by Government Counsel as follows:

"By Mr. Shearer:

"Q. Now, in regard to the income of the Hopkins Company beginning January 1, 1921, up to the end of the fiscal year that is involved in this case, it is true, is it not, that the Com-

(Testimony of Alonzo Wallace Helvern.)

missioner did determine a substantial income between those periods, January 1, 1921, and the [91] end of this fiscal year, for the Hopkins Company?

"A. If the Commissioner did make such determination, it was not known to me from my subsequent examination of the Revenue Agent's reports and records. There is no indication that any segregation was made by the Commissioner, from any knowledge I have after January 1st.

"Mr. Neylan: Here is one letter, November 1, 1920 to April 30th, 1921—is that what you are looking for?

"Mr. Shearer: Yes.

"Mr. Neylan: That includes the months of November and December, 1920, when it had a separate set of books. You will find that in the deficiency letter. I might say to counsel for the Government that the original thirty-day letter of the Commissioner, dated the 27th day of December, 1927, made no segregation to the Hopkins Company.

"Mr. Shearer: Counsel for Petitioner is correct in his statement. I was laboring under a misapprehension. The income set up in the deficiency letter of May 11, 1928, a copy of which is attached to the original petition in Docket No. 39701 shows that the income for the period ended April 30th, as a matter of fact,

(Testimony of Alonzo Wallace Helvern.)

was two months' income for November and December, 1920.

"No further cross-examination."

The foregoing is the substance of the evidence adduced at the trial of this proceeding pertaining to the issues involved in this appeal.

JOHN FRANCIS NEYLAN.
WCM.

J. PAUL MILLER.
WCM. [92]

I have no objection to the foregoing statement of evidence.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Settled and approved this 23rd day of May, 1933.

(Sgd) J. E. MURDOCK,
Member, U. S. Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Lodged May 19, 1933.

[Endorsed]: United States Board of Tax Appeals. Filed May 23, 1933. [93]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the Petition for Review in the above entitled case, transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit certified copies of the following documents:

1. The docket entries of all proceedings before the Board of Tax Appeals in the above entitled cause;

2. The Petition of the taxpayer, together with deficiency letter dated May 11, 1928, attached to which is "Statement of Returns Examined and Resulting Tax Liability;"

3. Answer of Commissioner of Internal Revenue;

4. Stipulation between attorneys for respective parties filed with the Board of Tax Appeals on or about February 10th, 1931;

5. Motion to file Amended Petition and Amended Petition; [94]

6. Commissioner's Answer to Amended Petition;

7. Notice to Produce from Petitioner's Attorney to Attorney for Respondent. (Not of record.)

8. Findings of Fact and Opinion of the Board, including Dissenting Opinion;

9. Motion of Counsel for Respondent to find deficiency in sum of $69,114.02;

10. Notice under Rule 50;

11. Decision of the Board;

12. Petition for Review to the Circuit Court of Appeals for the Ninth Circuit;

13. Notice of Filing of Petition for Review;

14. Petitioner's Exhibit number one, being the consolidated Income and Profits Tax Return filed by Petitioner on behalf of itself, National Paper Products Company, and Sanitary Products Corporation;

15. Respondent's Exhibit "A", being Income and Profits Tax Return filed by Zellerbach Paper Company, as successor to A. S. Hopkins Company for the calendar year 1920;

16. Statement of Evidence;

17. This Praecipe;

the foregoing to be prepared, certified, and transmitted [95] as required by law and the rules of the Circuit Court of Appeals for the Ninth Circuit.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 31, 1932. [96]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages,

1 to 96, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of June, 1933.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7209. United States Circuit Court of Appeals for the Ninth Circuit. Zellerbach Paper Company, a Corporation, Petitioner. vs. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 3, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 7209, 7210 AND 7211

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZELLERBACH PAPER COMPANY, a Corporation,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
No. 7209

ZELLERBACH PAPER COMPANY, a Corporation, as Transferee of A. S. Hopkins Company,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
No. 7210

NATIONAL PAPER PRODUCTS COMPANY, a Corporation,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
No. 7211

Upon Petitions to Review Orders of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit

ZELLERBACH PAPER COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39701
NATIONAL PAPER PRODUCTS COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39715
ZELLERBACH PAPER COMPANY, as transferee of A. S. Hopkins Company, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39704

STIPULATION AND ORDER FOR CONSOLIDATION ON APPEAL.

Whereas, the three above-named cases, upon motion of John Francis Neylan, Counsel for Petitioners,

and consented to by Counsel for Respondent, were consolidated by order of the United States Board of Tax Appeals for trial; and

Whereas, after said trial by the United States Board of Tax Appeals of said consolidated cases, a joint opinion applying to said three cases was rendered by said Board; and

Whereas, petitions for the review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit have been filed by the Petitioners with the Clerk of the United States Board of Tax Appeals, and the appeals perfected; and

Whereas, the same point of law is involved in each of said three cases, to-wit: is the collection from the Petitioners of the additional tax claimed by the Respondent for the fiscal year ending April 30th, 1921, barred by the Statute of Limitations; and

Whereas, it is the opinion of the respective Counsel for the parties to the said three cases that it would most suit their convenience in the handling of the said cases on appeal, and would also be of great assistance to the said United States Circuit Court of Appeals in its determination of said cases, if said cases should be consolidated for purposes of appeal;

It is hereby stipulated by and between John Francis Neylan and J. Paul Miller, Counsel for each of the Petitioners in the above-entitled cases, and C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for the Respondents in each of said cases,

1. That said cases may be consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of oral argument before said Court;

2. That but a single printed transcript of record on appeal be prepared by and printed under the direction of the Clerk of said Court, said Clerk to avoid including in said printed transcript more than one copy of such matters and documents as are duplicated in the certified transcripts of record sent up to him by the Clerk of the United States Board of Tax Appeals;

3. That on all occasions, when pursuant to law or rule of court, the parties to said cases are privileged to file briefs, a single brief, rather than three, may be filed, wherein all matters involved in all of said cases may be discussed and argued;

4. That the said three cases may be heard by the United States Circuit Court of Appeals for the Ninth Circuit upon one oral argument before said Court.

Dated: San Francisco, California, February 1st, 1933.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondents.

It is hereby ordered, that pursuant to the foregoing stipulation, the three above-named cases be

and they are hereby consolidated in accordance with the terms of said stipulation.

Dated: San Francisco, California, March 10, 1933.

CURTIS D. WILBUR,
United States Circuit Judge.

Now, June 20, 1933, the foregoing Stipulation and Order certified from the record as a true copy.

.....

Clerk Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Received Mar. 14, 1933.

[Endorsed]: Filed Jul. 3, 1933. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-fourth day of July, in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding, Honorable FRANK H. NORCROSS, District Judge.

No.....

In the Matter of the Substitution of Guy T. Helvering, as Commissioner of Internal Revenue in the Place of David Burnet.

Upon consideration of the motion of petitioner or petitioners, consented to by respondent or re-

spondents, in each of the following causes, It Is Ordered that Guy T. Helvering, as Commissioner of Internal Revenue be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue in each of the following cases, and that each of the following causes be so continued and maintained:

National Paper Products Company vs. Commissioner of I. R. No. 7140.
Same vs. Same. No. 7211.
Zellerbach Paper Company vs. Commissioner of I. R. No. 7141.
Same vs. Same. No. 7209.
Same vs. Same. No. 7210.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the fourteenth day of December in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

ORDER OF SUBMISSION

ORDERED petition to review in each of above causes argued by Mr. John Francis Neylan, counsel

for petitioners, and by Mr. Francis H. Horan, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the twenty-eighth day of February in the year of our Lord One Thousand Nine Hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk and that a judgment be filed in each cause and entered in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Petitions to Review an Order of the United States Board of Tax Appeals.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

WILBUR, Circuit Judge:

Petitioners seek a review of the decision of the Board of Tax Appeals sustaining deficiency tax assessed upon the incomes of the petitioners for their taxable year ending April 30, 1921. A consolidated return was filed by the Zellerbach Paper Company and its affiliated corporations, the National Paper Company and the A. S. Hopkins Company, on July 16, 1921 while the Revenue Act of 1921 was in force and before the enactment of the Revenue Act of 1921, which was made retroactively effective to January 1, 1921. Tax was fixed against each of the corporations on the consolidated return. This consolidated return showed a gross income of $5,826,652.14, credits and deductions claimed of $5,067,846.02, net income of $758,-546.17. The original return is before us and we summarize its contents in the language of the petitioners' brief:

> "The return is on United States Internal Revenue Service Form 1120; it is supported by complete detailed schedules totalling over fifty pages, including the following, stated in consolidated form and separately where necessary, for the parent company and its subsidiaries:

Balance sheets;

Analyses of surplus accounts and reconciliations thereof:

Details of gross income and deductions;

Schedules of depreciation;

Lists of dividends received;

Details of liberty bond exempt interest;

Schedules showing adjustments of book balance sheets for income tax purposes;

Copies of journal entries affecting the foregoing adjustments;

Schedules showing the computation of invested capital;

Schedule of inadmissible assets;

Inventory certificates."

The Commissioner's audit of the return attached to the deficiency letter covers 29 pages of the transcript and shows net income for the Zellerbach Paper Company of $774,423.89, an increase of net income of $242,185.60, and an increase of tax of $64,024.37; a net income of $355,297.11, an increase of tax of $31,141.52, for the National Paper Products Company, and a net income of $10,700.61 and an increase of $1,688.70 for the A. S. Hopkins Company.

The petitioners allege that no changes in their return were made necessary by the Revenue Act of 1921 other than the change in the $2,000 exemption. This allegation was denied and the Board of Tax Appeals made no finding thereon, but did find that the return filed showed an exemption of $2,000 to

which the petitioners were not entitled under the Revenue Act of 1921 for the four months of the taxable year in the calendar year 1921.

The sole question presented is whether or not the deficiency notice of May 11, 1928 was too late.

The Revenue Act of 1926 in force at the time the notice of deficiency was mailed provided that an income tax imposed by the Revenue Act of 1921, or any prior act, must be assessed within four years after "the return" was filed. The only return made by the taxpayer for its taxable year ending April 30, 1921 was that filed July 16, 1921.

The question submitted to us has been decided against the contention of the Commissioner by two Circuit Courts of Appeals (Myles Salt Co. v. Commissioner (C. C. A. 5), 49 Fed. (2d) 232; Valentine Clark Co. v. Commissioner (C. C. A. 8), 52 F. (2d) 346, and by the Court of Appeals of the District of Columbia, Isaac Goldmann v. Commissioner, 51 F. (2d) 427). Nevertheless the Commissioner declines to accept these decisions and the Board of Tax Appeals has again sustained the position of the Commissioner. The Attorney General asks us to sustain the Commissioner and the Board of Tax Appeals is frankly looking to a conflict of decision which will enable him to invoke the jurisdiction of the Supreme Court to settle the conflict in favor of the Commissioner. The question thus presented is one

that must be determined by us according to our own judgment with due consideration of the weight that should be attached to prior decisions of courts of coordinate jurisdiction.

We will first develop the case as we see it and then comment somewhat briefly upon the cases cited above in which the express question has been decided.

What is a return?

Notwithstanding the importance of the question in the administration of the income tax provisions of the Revenue Acts the meaning of the word "return" has never been legislatively defined, and hence the courts have been required to define the term as applied to specific cases presented to them. It is clear from the provisions of the Revenue Acts that the return required from the taxpayer must show his gross income, the deductions and credits, and his net income, within the meaning of those terms as defined in the act itself (Rev. Act. 1921, §239 (a); see Florsheim Bros. Dry Goods Co. v. U. S., 280 U. S. 453). All these terms are flexible and have been changed by almost every Revenue Act. It should be observed that "gross income" is quite distinct from gross receipts and that deductions therefrom permissible by law in estimating the net income are quite distinct from the taxpayer's expenditures, or outgo. The Revenue Acts expressly require the return to show the deductions from the gross income allowed by the law (§239 (a) Rev. Act 1921) to determine the taxable net income. The pe-

titioners in the case at bar do not contend that their return shows either the "deductions" allowed by the Revenue Act of 1921 or the "net income" as fixed by that Act, but they do claim that the return they made July 16, 1921 did show the gross revenue, the deductions therefrom and the net revenue under the Revenue Act of 1918 in force at the time the return was made, and that their failure to show the net income in accordance with the subsequently enacted Revenue Act of 1921 was not their fault because it was impossible to know what the Revenue Act of 1921 would require. This must of course be conceded, but the question remains, did Congress, in requiring a return for the purpose of levying a tax under the Revenue Act of 1921 showing the deductions therein allowed, intend to adopt as sufficient a return theretofore filed which did not show the deductions as therein authorized and provided and did not purport to do so? Was such a return under the Revenue Act of 1918 a return "under this Act" within the meaning of the Revenue Act of 1921 which set the statute of limitations running against the Commissioner? And was it "the return under the Revenue law of 1921" within the meaning of the limitation provisions of §277 (a), sub (2), of the Revenue Act of 1924, or within the meaning of §277 (a) (2) of the Revenue Act of 1926 which was in force at the time the deficiency assessments were levied and which are here involved? To thus state the question is to answer it, and the obvious answer is no. But there is a complication due to the fact that the income tax pro-

visions of the Revenue Act of 1921 passed November 23, 1921 are made retroactive to January 1, 1921, and the petitioners' return was filed after that date. We believe, however, that this is a false quantity in the matter for if by relation of the Act of 1921 to a date prior to the filing, the petitioners' return can be said to be a return "under the Act" the fact that it did not comply with the act (not yet passed) and did not conform to its requirements (not yet known) show that it could not be a return "under the Act" within the meaning of the new Revenue Act requiring other and different statements than were contained in the return on file. It might be said that by the retroactive provisions of the Act of 1921 the return filed by the taxpayer before the Act was passed was a return after it was passed, but not that it was a return "under the Act", because it did not conform to or comply with the act.

The Commissioner rendered a decision March 6, 1922 (T. D. 3305) requiring the taxpayers who had filed a return for the taxable year 1921 (that is, any fiscal year ending in the calendar year 1921) to file a "new return" where under the Revenue Act of 1921 an additional tax was required. This was in accord with his practice under prior revenue acts, particularly when the Revenue Act of 1917 was replaced by the Revenue Act of 1918 (T. D. 2797). In the latter case the rule (T. D. 2797) referred to the return filed under the Revenue Act of 1917 as the "original return" and the return required by the decision as an "amended return".

It is clear from what has been stated that the Revenue Act of 1921 required a return from the petitioners stating, among other things, their deductions, and that the rule of the Commissioner also required a return from the petitioners. They made no such return. It is thought that there is some significance in the use by the Commissioner of the terms "original" return, and "new return" in the decision requiring a "new return" and that therefore the "original return" should be regarded as "the return", or the return "under the Act", within the meaning of the limitation provisions of the Revenue Act of 1921 (§250 (d), the Revenue Act of 1924 (§277 (a) (2) and the Revenue Act of 1926 (277 (a) (2). These terms are wholly unknown to the Revenue Acts. The fact that the Commissioner happened to refer to the return required by the new act as a "new" return, or as an "amended" return is wholly without significance in determining the statute of limitations fixed by Congress in the Act. In this connection the decision of the Supreme Court in Florsheim Bros v. United States, supra, is significant. The Commissioner called for a "tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return" on form 1031T. In holding that this was not a "return" within the meaning of the Revenue Act, the court made clear that the name given by the Commissioner was not of great significance in determining its legal effect. We quote from that opinion as follows:

> "We are of opinion that the filing of the document known as Form 1031T, duly executed, did not start the running of the period of limitation. Form 1031T is not an instrument expressly provided for in the Act. It is not in the nature of a 'list', 'schedule', or 'return', commonly required by tax statutes. It was an invention of the Commissioner designed to meet a peculiar exigency. * * * As Form 1031T made no reference to income, or to deductions or credits, it could not have been intended as the return 'stating specifically the items of gross income, and the deductions and credits'—the return required to satisfy the statute."

In considering the question as to whether or not the Revenue Act of 1921 required a return from those whose taxable year ended in 1921, it is important also to consider the provisions of §205 (a) providing the method by which the taxpayer should make a return "for the fiscal year beginning in 1920 and ending in 1921". This section of the statute required the taxpayer to estimate his gross revenue and his net revenue for his taxable year in accordance with the terms of the Revenue Act of 1918 and to again estimate his gross income and his net income for the taxable year under the provisions of the Revenue Act of 1921. He was required to estimate the tax by taking eight-twelfths of his income estimated under the Revenue Act of 1918 taxed at the rates fixed by the Revenue Act of 1918,

and four-twelfths of the tax on the net income estimated under the Revenue Act of 1921 at the rates provided in the Act of 1921, and his tax for his taxable year was the sum of these two amounts. The Revenue Act of 1921 expressly provides that this tax "shall be his tax *under this title* for the taxable year 1921." (Italics ours) It is clear then that, although the tax for that portion of the taxable year in the calendar year 1920 may be the same that it would have been under the Revenue Act of 1918 and the tax for that portion of the taxable year in the calendar year 1921 may be the same as it would have been under the Revenue Act of 1921, the provision for the method of taxation for the fiscal year 1920 and 1921 is fixed by the Revenue Act of 1921, and the tax is levied under the latter act, that is, to quote the terms of the statute, "under this title". The importance of this method of estimating the net income and the tax thereon is at once apparent when it is noted that the income of the taxpayer may have been actually received in a manner entirely disproportioned to the ratio fixed by the Revenue Act of 1921. The fact that the Revenue Act of 1921 continued in full force and effect the Revenue Act of 1918 until January 1, 1921 made it proper for Congress to enact this special provision for the taxation of those taxpayers whose returns were made for a taxable year ending in 1921, for otherwise it might very properly be contended by the taxpayer that his income actually received under the law of 1918 should be taxed under that law and his income actually

received under the Revenue Act of 1921 should be taxed under that law.

A somewhat similar situation arose under the Revenue Act of October 3, 1917. The Commissioner of Internal Revenue, by Art. 61, Reg. 33, required a return from a corporation which was dissolved prior to the passage of the War Revenue Act of October 3, 1917, which was subject to a tax imposed by the retroactive Act of October 3, 1917. The taxpayer contended that as it had filed a return under a law in existence at the time the return was filed this return started the running of the statute of limitations for making the assessment under the new act. Under these circumstances the district court held that the return made in compliance with the law in existence at the time the return was filed was not such a return as was required by the Revenue Act of October 3, 1917, and regulations thereunder, although it is expressly provided by the Act of October 3, 1917, §212, that "all the provisions of Title 1 of the Act of September 8, 1916, as amended by this act relating to returns, * * * are hereby made applicable to the tax imposed by this title". This decision was sustained by the Circuit Court of Appeals of the Eighth Circuit, December 1, 1925, Updike v. U. S., 8 F. (2d) 913. This was followed by decision to the same effect in U. S. v. Updike, 25 F. (2d) 746, which was sustained by the Circuit Court of Appeals of the Eighth Circuit in Updike v. United States, 32 F. (2d) 1, and by the Supreme Court in 281 U. S. 489. The Supreme Court did not find it necessary, however, to pass on the question

as to whether or not the return filed under the prior law was a return within the meaning of the Revenue Act of 1918 which fixed the limitation for assessment at five years after the return under prior Revenue Acts. In that regard Mr. Justice Sutherland, speaking for the court, said:

> "In accordance with the claim of the government the court below held that there was a failure to file a return within the meaning of paragraph (a). See also Updike v. United States, 8 F. (2d) 913. We assume without deciding the correctness of that view and consider the case accordingly."

The Court of Claims in Ralston v. United States, 58 F. (2d) 1065, had occasion to consider a similar question with relation to the effect of the repeal of the Revenue Act of 1916 and succeeding revenue acts by the Revenue Act of 1918 approved February 24, 1919. That court held on the authority of numerous decisions of the Board of Tax Appeals and of the decisions of the courts in the Updike cases above referred to, and of its own decision in Whitney-Baden Shipping Co. v. United States, 52 F. (2d) 1003, that the return filed June 16, 1919 after the enactment of the Revenue Act of 1918 was "the return" for the taxable year ending in 1918, and that the return of November 30, 1918, which was filed prior to the enactment of the Revenue Act of 1918 was not "the return" which started the statute of limitations running.

Judge Watkins, District Judge for the Western District of South Carolina in a similar case (Clifton Mfg. Co. v. U. S., 3 F. Supp. 508) affected by the enactment of the Revenue Act of 1918 held that the statute of limitations began to run on the filing of the second return on April 29, 1919, after the enactment of the Revenue Act of 1918 and not from the filing of the first return on May 28, 1918 for the taxable year before the enactment of the Revenue Act of 1918.

We will not attempt to repeat in this opinion the course of reasoning adopted by the Court of Claims in its two decisions above cited (Whitney-Baden Shipping Co. v. U. S., supra, Ralston v. U. S., supra,) nor of Judge Watkins (Clifton Mfg. Co. v. U. S., supra). It is sufficient for our purposes to state that that reasoning is in the main applicable to the effect of similar provisions in the Revenue Act of 1921 as related to the superseded Revenue Act of 1918 and the regulations thereunder. In this connection it should be borne in mind that the Revenue Act of 1921 changed the method of determining the gross income and the proper deductions therefrom and therefore changed the method of determining the net income. Consequently, in order that the taxpayer's return should show the gross income and the deductions therefrom according to the Revenue Act of 1921 it was essential that the taxpayer should state the same according to the method laid down in the new act. This was the return required by the act. It happened in the two instances dealt with by the Circuit Courts of Ap-

peals (Myles Salt Co. v. Commissioner, 49 F. (2d) 232, supra, and Valentine-Clark Co. v. Commissioner, 52 F. (2d) 346, supra), and by the Court of Appeals of the District of Columbia, (Isaac Goldmann v. Commissioner, 51 F. (2d) 427), that the only change in the net income of the taxpayer was that resulting from the repeal of the $2,000 exemption given by the Revenue Act of 1918 and repealed by the Revenue Act of 1921. The effect of this change under the provisions of the Revenue Act of 1921 was to increase the net income for the period in the calendar year 1921. It was accordingly held in these cases that the Revenue Act of 1921 did not clearly provide for a new return for taxable years ending in the calendar year 1921 and that the decision of the Commissioner requiring a return in all cases where there was an increased amount of tax under the Revenue Act of 1921 was a recognition of the return already filed as an "original return" and that the "new return" showing additional tax was something supplementary or amendatory to that return and consquently the statute of limitation began to run from the time of the filing of the "original" return and not from the time of filing the new return. These decisions are largely predicated on the proposition that the Commissioner knew the amount of the deduction authorized by the law of 1918 and repealed by the law of 1921, and that the method of apportioning that deduction was fixed by law, and that the net income for the taxable year 1921 could be readily computed, and thus the small additional amount of tax re-

quired by the Revenue Act of 1921 be readily ascertained.

In this connection it should be again observed that the Revenue Act of 1921 expressly required a return. That the return required was to show the allowable deductions and that the return on file did not comply with the requirements of the Revenue Act of 1921 in that respect, but instead showed the deductions authorized under the law of 1918. Not only did the Revenue Act of 1921 require a return showing deductions allowed by that Revenue Act, but the Commissioner expressly required a return in all cases when the tax was increased by the Revenue Act of 1921. The intention of the Commissioner to require a return under the Act of 1921 is clearly expressed in the decision requiring a "new return" in case an additional tax is imposed. We have already said that the fact that the Commissioner referred to the return required as a new "return" is not very significant in our opinion, for the Revenue Act required a return and the fact that the Commissioner called such a return a new return is not decisive or persuasive on the question of the legislative intent in starting the statute of limitations running when "the return" is filed. It should be noted also that under the uniform practice of the Department under all the revenue laws, as shown by the forms provided by the Department for such returns, a practice which is recognized by the various revenue laws themselves, one of the functions of the return is to fix the amount of the tax which the taxpayer

pays contemporaneously with the filing of the return. We will deal with that subject more at length in the companion case, No. 7140. It is fairly obvious that in requiring a return where the tax was increased it was the purpose of the Commissioner to provide a basis for the payment of the additional tax before the Commissioner was in a position to himself assess the tax. If Congress expressly provided for a return by the taxpayer for its fiscal year 1920-1921 as it clearly did, we do not see how the taxpayer can insist that a return filed by it before the Revenue Act of 1921 was enacted and which did not comply with the Revenue Act of 1921, started the running of the limitation under the Revenue Act of 1921 for making the assessment under that act, nor do we see how the phraseology of the decision of the Commissioner which expressly required the filing of a return can be held to excuse the filing of a return, on the theory that he adopted a return theretofore filed when that return is impliedly repudiated by the decision which expressly requires a new return in lieu thereof as a sufficient basis for an assessment of the tax under the Revenue Act of 1921. In determining the responsibilities and duties of the Commissioner and the taxpayer with reference to the return it should be recognized that there are millions of tax returns on file with the Commissioner, many of them no doubt as complicated as that of the petitioner's. Congress has repeatedly recognized that it sometimes takes years to make an adequate and complete investigation of the taxpayer's return and to

make an assessment thereon. Where the new revenue law changes the method of determining the net income by changing the method of determining the gross income or the amount of the deductions therefrom allowed in ascertaining the net income, a construction of the law which would make the period of limitation for the making of the assessment depend upon whether or not there is a change in the taxable base of the particular taxpayer whose return is under consideration, would put the whole question as to when the statute of limitation would run in a state of great uncertainty. It would render it impracticable for the Commissioner to know in a given case when the period of limitation would run, for to determine that question would require as careful an examination of the return as would be necessary to assess the tax.

From the standpoint of the Commissioner the requirement of an additional return where there is an additional tax was both reasonable and necessary. From the standpoint of the taxpayer no hardship was imposed upon him by such a requirement, he is presumed to know the provisions of the new revenue act and is therefore presumed to know that the act required a return in accordance with its provisions; that the act required an additional tax, and that the Commissioner in such a case had required a new return. If he chose to file a return referring to and incorporating his return already filed, the making of a new return would be quite as simple for the taxpayer as the computation of the tax would be for the Commissioner. Such a

return was made in exactly that fashion in the companion case, to which we will refer more particularly in the course of our decision in that case.

We think the really serious question involved in the matter of returns under the new act for the taxable year 1921 is not whether the Commissioner had a right to require a new return under the Revenue Act of 1921, the act itself required it, or whether he intended to do so, as he clearly did in the case at bar, but whether he had a right to excuse taxpayers from making a return under that law as he attempted to do where the statute expressly required such a return, that is, where there was no increase of tax. That question, however, is not involved here and we need not consider it.

We conclude that the taxpayer has failed to file "the return" required to start the statute of limitations running against the making of an assessment. It is conceded that the amount of the tax is correctly stated in the deficiency notice of the Commissioner, and that the same is justly due if the time has not expired for making the assessment.

The decision of the Board of Tax Appeals is affirmed.

[Endorsed]: Opinion. Filed Feb. 28, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7209

ZELLERBACH PAPER COMPANY,
a Corporation,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Feb. 28, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause—Consolidated Cases.]

APPLICATION FOR STAY OF MANDATE

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the Petitioners above named, by Messrs.

John Francis Neylan and J. Paul Miller, their counsel, and hereby make application to this Honorable Court for its order staying the issuance of the mandate in the above entitled cases until April, 29, 1934.

This application is made to this Honorable Court upon the grounds that an opinion in the above named cases was filed on the 28th day of February, 1934, in accordance with which a Judgment or Decree was, on said day, filed and entered, affirming the Judgment or Decree of the United States Board of Tax Appeals, and because of the said opinion, Judgment or Decree of this Court, the petitioners above named desire and intend to petition the Supreme Court of the United States for its Writ of Certiorari in the above entitled cases, requesting the said Supreme Court of the United States to review the decision of this Honorable Court in said matters, basing their said petition for a Writ of Certiorari upon the fact that there now exists a conflict between the following courts: the Circuit Courts of Appeal for the 5th and 8th Circuits and the Court of Appeals of the District of Columbia, on the one hand, and between this Honorable Court on the other hand, the decision of this Honorable Court in the above entitled cases being at conflict with decisions of the aforementioned courts upon identical legal questions.

Wherefore, Petitioners pray that the mandate of this Honorable Court be stayed as hereinabove applied for.

Dated: San Francisco, California, March 15, 1934.

JOHN FRANCIS NEYLAN
J. PAUL MILLER

[Endorsed]: Filed Mar. 15, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause—Consolidated Cases.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. John Francis Neylan and J. Paul Miller, counsel for the petititioner, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 29, 1934; and in the event the petition for a writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California, March 15, 1934.

[Endorsed]: Filed Mar. 15, 1934, Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and forty-four (144) pages, numbered from and including 1 to and including 144, to be a full, true and correct copy of the entire record, excluding original exhibits transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of March, A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 146] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5128-C)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 38

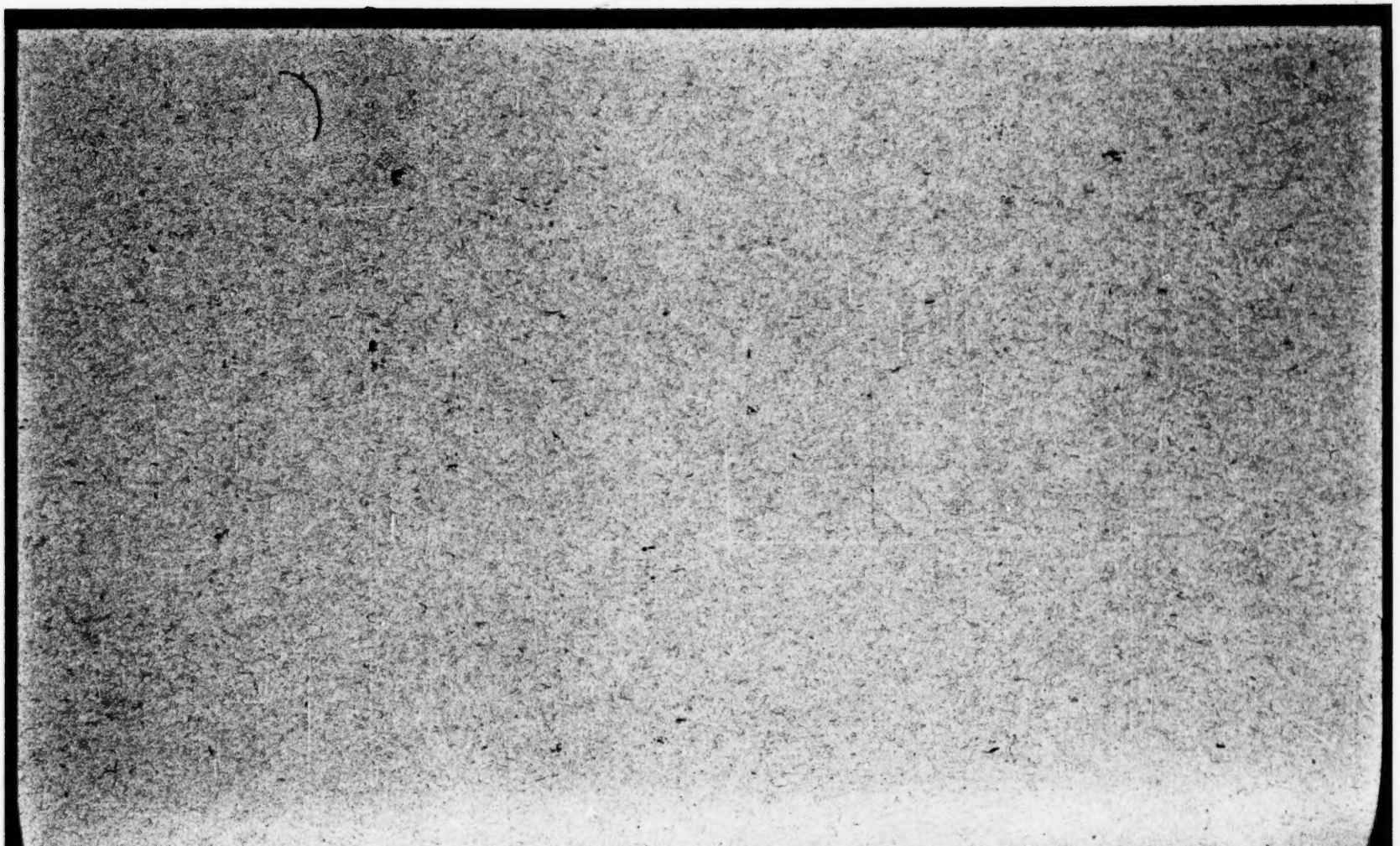
ZELLERBACH PAPER COMPANY, AS TRANSFEREE OF A. S. HOPKINS COMPANY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1934
CERTIORARI GRANTED JUNE 4, 1934



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 38

ZELLERBACH PAPER COMPANY, AS TRANSFEREE OF A. S. HOPKINS COMPANY, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1934

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APPEARANCES.

For Taxpayer:

JOHN FRANCIS NEYLAN, Esq.,
J. P. MILLER, Esq.,
W. C. MAGATHAN, Esq.

For Comm'r:

H. A. COX, Esq.,
F. R. SHEARER, Esq.,
E. L. CORBIN, Esq.

Docket No. 39704

ZELLERBACH PAPER COMPANY, Transferee of A. S. Hopkins Company,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

Transferred to Mr. Murdock 3/28/32

1928

Jul. 9—Petition received and filed. Taxpayer notified. (Fee paid)

" 10—Copy of petition served on General Counsel.

Aug. 7—Answer filed by General Counsel.

" 9—Copy of answer served on taxpayer. Circuit Calendar.

1931

Feb. 10—Stipulation of facts filed.

1931

Mar. 13—Motion for leave to file amended petition filed by taxpayer, amended petition tendered. 3/16/31 granted. Copy served. 3/19/31.

Apr. 24—Hearing set June 10, 1931 at Oakland, California.

May 12—Answer to amended petition filed by General Counsel. Copy served May 18, 1931.

Jun. 10—Hearing held before E. H. Van Fossan, Div. 9, on merits. On motion consolidated with dockets 39701 and 39715 for hearing and decision. Briefs due 60 days from date.

Jul. 13—Transcript of hearing of June 10, 1931 filed.

Aug. 6—Motion for extension of time to Aug. 31, 1931 to file brief filed by taxpayer. August 8, 1931 granted.

" 7—Motion for extension of 60 days from Aug. 9, 1931, to file brief filed by General Counsel.

" 11—Motion for extension of 60 days for respondent's brief granted.

" 31—Brief filed by taxpayer.

Oct. 6—Brief filed by General Counsel.

1932

Jan. 21—Motion for leave to file reply brief filed by taxpayer. Granted 1/29/32.

" 29—Reply brief filed by taxpayer. 1/30/32 copy served.

May 17—Findings of fact and opinion rendered, John E. Murdock, Div. 3. Judgment will be entered under Rule 50.

1932

May 21—Notice of appearance of J. Paul Miller as counsel for taxpayer filed.

" 31—Notice of settlement filed by General Counsel.

Jun. 3—Hearing set June 29, 1932 under Rule 50.

" 29—Hearing had before Miss Matthews, Div. 13, on settlement under Rule 50. Not contested. Referred to Mr. Murdock for decision.

Jul. 13—Decision entered, Logan Morris, Div. 14.

Oct. 4—Supersedeas bond in the amount of $3,500.00 approved and filed.

" 4—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 4—Proof of service filed. [1*]

" 31—Praecipe filed.

" 31—Proof of service filed.

Nov. 23—Statement of evidence lodged.

" 23—Notice of lodgment of statement with hearing 12/8/32 filed.

" 25—Notice of change of hearing date from Dec. 8, to Dec. 7, 1932.

" 30—Objections to statement of evidence filed by General Counsel.

Dec. 2—Order of U. S. Circuit Court of Appeals (9) enlarging time to Jan. 3, 1933, to transmit record filed.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Dec. 2—Motion for extension to Jan. 6, 1933 for hearing on statement of evidence filed by taxpayer. 12/5/32 granted to Dec. 28, 1932

" 15—Proof of service of objections filed by General Counsel.

" 27—Order from U. S. Circuit Court of Appeals (9) extending time to Feb. 3, 1933 to file transcript filed.

" 28—Hearing had before Mr. Sternhagen on approval of statement of evidence. On motion of petitioner, continued to Jan. 11, 1933.

" 28—Order continuing to Jan. 11, 1933 on approval of statement of evidence entered.

1933

Jan. 7—Order from Circuit Court of Appeals, (9) to transmit petitioner's exhibit No. "1" and respondent's Exhibit "A" in original form filed.

" 11—Hearing had before Mr. Arundell, Div. 7, on approval of statement of evidence. Continued to Jan. 25, 1933.

" 11—Motion to postpone hearing filed by petitioner. Granted to 1/25/33.

" 23—Copy of order from 9th Circuit enlarging time to March 3, 1933 to file transcript filed.

" 25—Hearing had before Mr. Marquette on approval of statement of evidence. On motion of petitioner continued to 2/15/33.

1933

Feb. 15—Hearing had before Mr. Murdock on approval of statement of evidence. Agreed statement to be filed.

" 28—Copy of order from U. S. Circuit Court of Appeals (9) granting extension to 4/3/33 to complete record filed.

Mar. 14—Order from U. S. Circuit Court of Appeals, (9) consolidating dockets 39701 and 39715 to send up one record filed.

Apr. 3—Order from U. S. Circuit Court of Appeals, (9) extending time to 5/3/33 to complete record filed.

May 4—Order from U. S. Circuit Court of Appeals, (9) granting extension to 6/3/33 to complete record filed.

" 8—Hearing had before Mr. J. E. Murdock, Div. 2 on settlement statement of evidence. Agreed statement to be filed.

" 19—Agreed statement of evidence lodged.

" 19—Amended praecipe filed.

" 19—Proof of service filed.

" 23—Agreed statement of evidence approved and ordered filed.

Jun. 2—Order from U. S. Circuit Court of Appeals (9) extending time to 7/3/33 to complete record filed.

" 2—Stipulation that transcript of minutes of hearing held 5/8/33 be included in record filed. [2]

United States Board of Tax Appeals

Docket No. 39704

ZELLERBACH PAPER COMPANY, Transferee of A. S. Hopkins Company,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:D:60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of California and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on May 11, 1928. [3]

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and for One Thousand Six Hundred Eighty-eight and 70/100 Dollars ($1,688.70).

The deficiency of $1,688.70 is a portion of a total deficiency of $96,854.59, assessed by the Com-

missioner of Internal Revenue against Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Company (subsidiary)	31,141.52
A. S. Hopkins Company (subsidiary)	1,688.70
Total deficiency	$96,854.59

The above total deficiency is based upon certain adjustments made by the Commissioner of the consolidated income of Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation and A. S. Hopkins Company. Accordingly, references herein to the petitioner or adjustments of the petitioner's (Zellerbach Paper Co., Transferee of A. S. Hopkins Co.) income will in some cases indicate adjustments applicable to the income of Zellerbach Paper Company or National Paper Products Company as well as the separate income of this petitioner.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors: [4]

A. ZELLERBACH PAPER COMPANY.

(a) The Commissioner erred in determining the deficiency set forth in his 60-day letter dated May 11, 1928, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, because the assessment of any additional tax for the said fiscal year is barred by Section 250(d) of the Revenue Act of 1918; Section

250 (d) . . . . (1) of the Revenue Act of 1921; Section 277 (a) . . . . (1) and Section 277(a) . . . . (2) of the Revenue Act of 1924; and Section 277(a) . . . . (2) and Section 277(a) . . . . (3) of the Revenue Act of 1926.

(b) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in proceeding upon the theory that inasmuch as the petitioner had filed its income tax return under the Revenue Act of 1918, but no additional return was filed by the taxpayer under the Revenue Act of 1921, that no statute of limitation applies.

(c) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, ignored the fact that inasmuch as there were no items of income or deductions in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and since the rates of income and profits taxes were the same under both Revenue Acts for the fiscal year involved, no additional tax would be shown by the filing of a second return under the 1921 Act; a proper return having been filed under the 1918 Act by this taxpayer. [5]

(d) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $7,293.86 to the income of Zellerbach Paper Company representing a writedown of the inventory at Batavia,

Java, branch from cost to fair market value as at April 30, 1921.

(e) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $2,249.61 to the income of Zellerbach Paper Company representing losses of customers' account at Batavia, Java, branch actually determined during the fiscal year ending April 30, 1921.

(f) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $4,167.29 to the income of Zellerbach Paper Company representing an actual loss in value (discovered in February 1921) of an inventory of merchandise as at December 31, 1920, and other assets which had been acquired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing as a deduction from the income of Zellerbach Paper Company $840.00, representing wages paid to the captain of the yacht owned by I. Zellerbach, which yacht was used in connection with the petitioner's business. [6]

B. NATIONAL PAPER PRODUCTS COMPANY

(h) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing $21,421.05,

representing write-down of the value of the wood in process inventory of National Paper Products Company at Carthage, New York, from cost to actual market value as at April 30, 1921.

C. CONSOLIDATED INVESTED CAPITAL

(i) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in excluding from the petitioner's consolidated invested capital the amount of $10,000.00, representing the value of certain patents, which value had been substantiated by the taxpayer.

(j) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. S. Hopkins Company was, prior to about February 28, 1920 a corporation organized and existing under and by virtue [7] of the laws of the State of California with its principal office at Sacramento, California.

The majority of the capital stock of A. S. Hopkins Company was acquired by the Zellerbach Paper Company on or about October 1, 1920, and the remaining outstanding shares of stock were acquired shortly thereafter, and this subsidiary corporation was dissolved and its assets taken over in liquidation by Zellerbach Paper Company about February 28, 1921, in exchange for the shares of its stock which were cancelled.

The net income of A. S. Hopkins Company for the nine months period ended September 30, 1920, was included in a separate income tax return which was filed with the Collector of Internal Revenue at San Francisco, California, March 15, 1921. The income of A. S. Hopkins Company from and after October 1, 1920, to and including the date of its dissolution, about February 28, 1921, was included in the consolidated income tax return filed by Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921. From and after the date of the liquidation of A. S. Hopkins Company, the business which it had formerly conducted at Sacramento, California, was conducted by Zellerbach Company as its Sacramento branch.

Zellerbach Paper Company filed a consolidated income tax return covering its own income and the income of National Paper Products Company and Sanitary Products Corporation for the fiscal year ended April 30, 1921, and also

included therein the income of A. S. Hopkins Company from October 1, 1920 to the date of its dissolution. This consolidated income tax return was correctly prepared in accordance with the provisions of the [8] Revenue Act of 1918, which was the revenue act in effect at the time that the said return was due. The said consolidated income tax return filed on July 15, 1921, was the only income tax return that has been filed by the petitioner. All items of income and expense included in Zellerbach Paper Company's operations and in the operations of its subsidiaries are reflected in the said consolidated income tax return filed on July 15, 1921 and are of such nature that the Revenue Act of 1921 is applicable thereto in exactly the same manner as the Revenue Act of 1918. The petitioner, after the enactment of the Revenue Act of 1921, did not prepare and file another return; such return, if filed, would be of exactly the same tenor as the return which had already been filed by the petitioner on July 15, 1921, as the various items of income and the expense included in the operations of Zellerbach Paper Company and its subsidiaries were required to be treated exactly the same under both the Revenue Act of 1918 and the Revenue Act of 1921.

The first deficiency notice for the fiscal year ended April 30, 1921, received by the petitioner from the Commissioner of Internal Revenue was mailed to the petitioner on May 11, 1928, being

received by the petitioner several days thereafter.

The said first deficiency notice was mailed more than five years after said consolidated income tax return for the fiscal year ended April 30, 1921 was filed, to-wit; approximately six years and ten months thereafter. [9]

The petitioner has never entered into any agreement in writing or otherwise with the Commissioner of Internal Revenue consenting to a later determination, assessment and/or collection of income or profits taxes or extending the time for said determination, assessment and/or collection of tax to any date beyond the statutory limitations provided by the Revenue Acts applicable to the tax for the fiscal year here in issue. The petitioner has never waived the right to file a petition with the United States Board of Tax Appeals, nor consented to the assessment and collection of any deficiency in tax for the fiscal year ended April 30, 1921.

During the fiscal year ended April 30, 1921 and for a number of years prior thereto, Zellerbach Paper Company had operated a branch at Batavia, Java. Owing to the business depression in Java in the years 1920, 1921 and 1922 a profit of only $6,977.63 was realized from the operations of this branch for the fiscal year ended April 30, 1921. In the succeeding fiscal year conditions were even worse, and the Batavia branch sustained losses aggregating $11,351.29. In making determination of the pro-

fits of the Batavia branch for the fiscal year ending April 30, 1921, it was necessary to write down certain items in the inventory of merchandise from cost to the market value at April 30, 1921. The aggregate reduction of the inventory thus obtained was $7,293.86. Owing to the depressed business conditions, a review of accounts receivable of the Batavia branch indicated that items aggregating $2,249.61 [10] included therein would be uncollectible, and a reserve was set up to take care of these losses.

The Commissioner in making his determination of the petitioner's income disallowed the $7,293.86 write-down of the inventory and the reserve of $2,249.61 to provide for the losses of accounts, upon the theory that the write-down of inventory was a mere depreciation of inventory and that the loss of accounts receivable provided for by the reserve was merely an estimated loss.

During the fiscal year ended April 30, 1921, and as at about December 31, 1920, Zellerbach Paper Company received as transferee from A. S. Hopkins Company an inventory of certain merchandise and certain accounts receivable owing to A. S. Hopkins Company and other assets. Certain merchandise of A. S. Hopkins Company having a value of $4,167.29 had been previously transferred to Zellerbach Paper Company and charged to it by the Hopkins Company. At the time of taking over the said assets from A. S. Hopkins Company, the value of this merchan-

dise, $4,167.29, was reflected on the books of the Hopkins Company as an account receivable. Owing to the fact that from about October 1, 1920, Zellerbach Paper Company had been in control of A. S. Hopkins Company, the corresponding credit of $4,167.29 had not been recorded on the books of Zellerbach Paper Company as a liability to A. S. Hopkins Company, although the merchandise received from the Hopkins Company had been included in Zellerbach Paper Company's inventories of merchandise, and, thus, when Zellerbach Paper Company took over all the assets of the Hopkins Company, (including the said [11] account receivable of $4,167.29 on the books of A. S. Hopkins Company) the value of this account receivable was, in effect, a duplication in value of certain merchandise included in the merchandise inventories of Zellerbach Paper Company, which duplication in value had been taken up as income.

In February 1921, this duplication was discovered, and the amount of $4,167.29 was charged to Zellerbach Paper Company's surplus account. The Commissioner disallowed this charge of $4,167.29 as a deduction and added it to the taxpayer's net income for the fiscal year ended April 30, 1921.

Mr. I. Zellerbach, during the fiscal year ended April 30, 1921, was, and still is, the president of Zellerbach Paper Company. He was the owner of a yacht which he used for the purpose of

entertaining business associates and customers of Zellerbach Paper Company and its subsidiary companies. The wages of the captain of this yacht, $840.00 for the fiscal year ended April 30, 1921, were paid by Zellerbach Paper Company and charged to expense. The Commissioner disallowed this expense upon the theory that it was not an ordinary and necessary expense of the business.

The National Paper Products Company, at the close of the fiscal year ended April 30, 1921, in taking its inventory at cost or market, whichever is lower, wrote down the value of its inventory of wood in process at its rossing plant at Aldrich, New York, in the amount of $21,-421.05. Certain timber had been cut and placed in the rossing process and records had been kept of the various costs applied to this timber in the said process. [12] The wood in the inventory was situated at the company's plant at Aldrich, which was some distance from Carthage, New York, the point at which this wood was to be marketed. To determine a market value applicable to this wood in process at Aldrich, the National Paper Products Company first applied the market price at Carthage and thereafter deducted the transportation and other costs which would have to be incurred in bringing this wood from Aldrich to Carthage.

The Commissioner disallowed the said write-down of the wood inventory on the assumption

that the market value had not been substantiated.

As at October 5, 1914, the National Paper Products Company acquired certain patents from the Lazar-Aicher Paper Company in exchange for $100,000 par of the capital stock of the National Paper Products Company. Subsequently, cash expenditures of $3,759.05 were made in perfecting these patents, and additional patents were acquired for $10,000 cash. These patents acquired for capital stock were originally set up on the books of the National Paper Products Company at a value of $100,000. By a subsequent book entry, $90,000 of the patent account was set up in an account designated "Goodwill". This goodwill of $90,000 was, as at April 30, 1916, written off against surplus.

The Commissioner refused to recognize any value as attaching to the patents acquired for capital stock and excluded the amount of $10,000 at which these patents were carried in the fiscal year ended April 30, 1921, in making his determination of the petitioner's consolidated invested capital. [13]

6. The petitioner prays for relief from the deficiency asserted by the Commissioner in the following and each of the following particulars:

(a) The petitioner prays the Board to find that the assessment of any additional tax for the fiscal year ended April 30, 1921, is barred by Section 250 (d) of the Revenue Act of 1918;

Section 250 (d) . . . (1) of the Revenue Act of 1921; Section 277 (a) . . . (1) and Section 277 (a) . . . (2) of the Revenue Act of 1924; and Section 277 (a) . . . (2) and Section 277 (a) . . . (3) of the Revenue Act of 1926.

(b) The petitioner prays the Board to find that the Commissioner erred in proceeding upon the theory that inasmuch as no additional return was filed by the petitioner under the Revenue Act of 1921 after a return under the Revenue Act of 1918 had been filed, no statute of limitation applies.

(c) The petitioner prays the Board to find that there are no items of income or deduction in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and that the rates of both income tax and excess profits tax for the fiscal year ended April 30, 1921, are the same under the Revenue Acts of 1918 and 1921, and that the filing of an additional return under the Revenue Act of 1921 was not required, as a proper return had been filed under the 1918 Act by the petitioner.

(d) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year [14] ended April 30, 1921, was entitled to write down its inventory at Batavia, Java, branch by $7,293.86, being the excess of cost over its fair market value as at April 30, 1921.

(e) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to charge off as a deduction $2,249.61 representing losses of customers' accounts at Batavia, Java, branch actually determined as at April 30, 1921.

(f) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to deduct therefrom $4,167.29 representing an actual loss in the value of merchandise and other assets which had been acquired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The petitioner prays the Board to find that Zellerbach Paper Company in determining its net income for the fiscal year ended April 30, 1921, is entitled to claim a deduction for $840.00 representing wages paid to the captain of the yacht owned by I. Zellerbach, used in connection with petitioner's business.

(h) The petitioner prays the Board to find that National Paper Products Company in determining its income for the fiscal year ended April 30, 1921, is entitled to a deduction of $21,421.05 representing write-down of the value of its wood in process inventory at Carthage, New York, as at April 30, 1921. [15]

(i) The petitioner prays the Board to find that it is entitled to have included in the consolidated invested capital of Zellerbach Paper

Company and subsidiaries for the fiscal year ended April 30, 1921, the amount of $10,000.00 representing the value of certain patents which had been substantiated, but were disallowed by the Commissioner.

(j) The petitioner prays the Board to find that the Commissioner erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of the taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

(k) The petitioner prays for such other and further relief as the nature of the case may require, and which to the Board may seem equitable and proper in the premises.

WHEREFORE, the petitioner prays that the Board may hear and redetermine that there is no deficiency.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner,
Crocker First National Bank Bldg.
San Francisco, California. [16]

State of California,
City and County of San Francisco.—ss.

A. Van der Zwiep, being duly sworn, says that he is the Secretary of Zellerbach Paper Company, and

that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

[Seal Zellerbach Paper Co.] A. VAN DER ZWIEP.

Subscribed and sworn to before me this 5th day of July, 1928.

(Seal) LULU A. GODSIL,
Notary Public.

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires September 13, 1931. [17]

EXHIBIT A

TREASURY DEPARTMENT
Washington

Mailed
May 11, 1928

IT:CR:D:60D
CAM
Zellerbach Paper Company,
534 Battery Street,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the period Nov. 1, 1920 to

April 30, 1921, discloses a deficiency of $1,688.70, as shown in the attached statement, as transferee of the A. S. Hopkins Company, Sacramento, California under Section 280 of the said Act.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner
By C. B. Allen
Deputy Commissioner

BHB-3
Inclosures:
Statement
Form A.
Form 882. [18]

IT:CR:D:60D

STATEMENT OF TAX LIABILITY

Company	Period	Deficiency in Tax
A. S. Hopkins Company (Transferor) Sacramento, California	November 1, 1920 to April 20, 1921	
Zellerbach Paper Company (Transferee)		$1 688.70

The adjustments producing the above-stated results are shown in schedules attached to a letter addressed to Zellerbach Paper Company, San Francisco, California.

The records of this office indicate that the A. S. Hopkins Company was dissolved about March 3, 1922, and the assets transferred to you on or about February 28, 1921.

Section 280 of the Revenue Act of 1926, provides for the assessment, collection and payment of the liability at law or in equity of a transferee of property of a taxpayer in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed on the taxpayer by this title or by any prior income, excess profits or war profits tax.

Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds that no Statute of Limitations applies.

BHB-3 [19a]

EXHIBIT A.

TREASURY DEPARTMENT
Washington

May 11, 1928

Office of
Commissioner of Internal Revenue

IT:CR:D:60D
CAM

Zellerbach Paper Company,
534 Battery Place,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1921, discloses a deficiency of $65,024.37, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Deputy Commissioner.

Inclosures
Statement.
Form A.
Form 882. [19b]

IT:CR:D:60 D
CAM

STATEMENT OF RETURNS EXAMINED AND RESULTING TAX LIABILITY

Company	Fiscal Year	Form	Deficiency in Tax
Zellerbach Paper Company, San Francisco, Calif.	April 30, 1921	1120 Consolidated	$64,024.37
National Paper Products Company San Francisco, Calif.	April 30, 1921	1120 Consolidated	$31,141.52
A. S. Hopkins Company San Francisco, Calif.	Period Nov. 1, 1920 to April 30, 1921	1120	$ 1,688.70

The adjustments producing the above-stated results are shown in the attached Schedules 1 to 15, inclusive.

The information submitted in your brief dated February 7, 1928, has been carefully considered.

Your contention that "Depreciation on Merchandise" and "Estimated Bad Accounts", included as taxable income in Batavia Branch, were allowable deductions is denied, as your contention is not substantiated.

Your contention that "Inventory Transfer from A. S. Hopkins Company" is an allowable deduction is denied as same is allowed to A. S. Hopkins Company as a deduction, Schedule 6.

Your contention that items charged to dues and subscriptions in the amount of $470.00, are necessary business expenses is allowed for "Membership Fee, Kiwanis Club" and "Subscription to Linweave Association" but denied for "Book Club of California (J. D. Zellerbach)".

Your contention that items charged to headquarters expense are allowable is conceded for the "Cancellation of Contract", but denied for "Salary to captain of J. Zellerbach's private yacht." The mere fact that customers were occasionally entertained on the yacht is not sufficient reason for allowing the deduction.

Your contention relative to the following items, National Paper Products Company is sustained and allowed: [19c]

1. Loss in operation, Brooklyn Soap Plant.
2. Gifts to employees.
3. Unallowable deduction.

Your contention that "Depreciation of Wood Inventory" is allowable is not substantiated.

Your contention for additional depreciation, Carthage Branch has been previously denied for prior years and no evidence having been submitted in your brief to substantiate your claim, the previous denial is sustained.

Your contention that net income for the two months ended December 31, 1920 of A. S. Hopkins Company, should not be included is denied. Evidence shows that the above-named company was affiliated with your company for the period November 1, 1920 to April 30, 1921, accordingly the income for that period is properly income of the consolidation. Adjustment will be made to A. S. Hopkins Company.

Your contention that Patents disallowed from invested capital should be restored in the amount of $10,000.00, has been denied for prior years and that decision is herein sustained.

Your contention for adjustments of taxes prior years and inadmissibles are dependent upon prior years which are still in controversy and no adjustment can be made in this audit.

Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds that no Statute of Limitations applies.

A copy of this letter has been mailed to John Francis Neylan in accordance with the authorization contained in your power of attorney dated March 3, 1925, running to him, which is on file in this office.

[Endorsed]: United States Board of Tax Appeals. Filed July 9, 1928. [19d]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2. Admits the allegations in paragraphs 1 and 2.

3. Admits the allegations in paragraph 3, except that he says the deficiencies therein stated have not been assessed.

5. Admits that in determining the deficiency shown in 60-day letter dated May 11, 1928, the Commissioner did not recognize any value as attaching to certain patents, and disallowed certain alleged inventory and bad debts adjustments. Denies that the A. S. Hopkins Company filed a return for the fiscal year ended April 30, 1921, at any time. Denies the remaining allegations in paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the petition be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

7/30/28

[Endorsed]: United States Board of Tax Appeals. Filed Aug. 7, 1928. [20]

[Title of Court and Cause.]

MOTION TO FILE AMENDED PETITION

Now comes ZELLERBACH PAPER COMPANY, Transferee of A. S. Hopkins Company, Petitioner above named, by John Francis Neylan, Esquire, its Counsel, and moves the Board for leave to file an amended petition, same being attached hereto.

JOHN FRANCIS NEYLAN
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed Mar. 13, 1931. [21]

[Title of Court and Cause.]

AMENDED PETITION.

Now comes the above named petitioner and amends its petition heretofore filed in the above entitled matter on the 9th day of July, 1928, said amended petition being prepared and filed in accordance with a stipulation entered into by and between the petitioner and the respondent by their respective counsel, and filed with the Clerk of the Board of Tax Appeals at Washington, D. C., on the 10th day of February, 1931, a copy of which is attached hereto and made a part hereof.

Said petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner

of Internal Revenue in his notice of deficiency (IT:CR:D60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. Petitioner is a corporation organized under the laws of the State of California, and having its principal office and place of business at 534 Battery Street, San Francisco, California. [22]

2. The notice of deficiency, a copy of which is attached to the original petition filed herein, and marked Exhibit "A," and which is incorporated herein by reference thereto, was mailed to the petitioner on May 11, 1928.

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and the amount in controversy as per the notice of deficiency, was the sum of $1,688.70, which, however, has been altered by stipulation of counsel, a copy of which is attached hereto and made a part hereof, and is now the sum of $1,744.37.

The deficiency of $1,688.70 as set forth in the notice of deficiency is a portion of a total deficiency of $96,854.59, assessed by the Commissioner of Internal Revenue against Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Co. (subsidiary)	31,141.52
A. S. Hopkins Co. (Zellerbach Paper Company as Transferee)	1,688.70
Total deficiency	$96,854.59

The petitioner herein alleges that by reason of those certain stipulations filed in this matter, and in the matter of Zellerbach Paper Company, petitioner, versus Commissioner of Internal Revenue, respondent, Docket No. 39,701, and in the matter of National Paper Company, petitioner, versus, Commissioner of Internal Revenue, respondent, Docket No. 39,715, the amounts now due from the respective taxpayers are as follows: [23]

Zellerbach Paper Company	$69,114.02
National Paper Products Co.	32,990.18
Zellerbach Paper Co. as Transferee of A. S. Hopkins Co.	1,744.37

Provided, however, that the Statute of Limitations does not bar the right of the respondent herein to collect the amounts as hereinabove set forth.

The petitioner alleges therefore that the various items in controversy as set forth in the original petition filed herein have now been adjusted and agreed upon by and between the parties hereto, save and excepting the question as to whether or not the Statute of Limitations bars the right of the respondent herein to collect said additional taxes or any part of same.

4. The determination of the tax set forth in the hereinabove mentioned notice of deficiency in the sum of $1,688.70, and the determination of the tax thereafter by the respondent herein, in the sum of $1,744.37, is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his sixty day letter

dated May 11, 1928, and in his later determination as hereinabove set forth, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, by reason of the fact that the assessment of any additional tax for said fiscal year was and is barred by Sections 250(d) of the Revenue [24] Act of 1918, 250(d)(1) of the Revenue Act of 1921, Section 277(a)(1) and Section 277(a)(2) of the Revenue Act of 1924, and Section 277(a)(2), Section 277(a)(3) and Section 1106(a) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928.

(b) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred in proceeding upon the theory that inasmuch as the petitioner had filed its income tax return under the Revenue Act of 1918, but no additional return was filed by the petitioner under the Revenue Act of 1921, no Statute of Limitations applies.

(c) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred by ruling that an additional return was necessary under the Revenue Act of 1921, inasmuch as there were no items of income or deduction in the consolidated return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921.

5. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) Petitioner herein relies upon the facts as recited in that certain stipulation signed by Counsel for the respective parties hereto, and which has been filed herein, and adopts said recital of facts in said stipulation as [25] a part of this amended petition.

(b) Petitioner refers to that certain petition and that certain amended petition filed before the United States Board of Tax Appeals and entitled Zellerbach Paper Company, petitioner, vs. Commissioner of Internal Revenue, respondent, Docket No. 39,701, and adopts the statement of facts as set forth in said petition and said amended petition insofar as said recitals affect this proceeding, incorporating said recital of facts by reference thereto.

(c) Under the Revenue Act of 1918 any additional assessment was required to be made within five years after the date of the filing of the return. This is provided in Section 250(d) of the Revenue Act of 1918, and carried forward under Section 250(d)(1) of the Revenue Act of 1921, Section 277(a)(2) of the Revenue Act of 1924, Section 277(a) of the Revenue Act of 1926, and Section (1) of the Revenue Act of 1928. The Revenue Act of 1921 provided that any assessment of any additional taxes for the taxable year 1921, or succeeding taxable years, should be determined and assessed by the Commissioner within four years after the re-

turn was filed. This was carried forward under Section 277(a)(1) of the Revenue Act of 1924, Section 277(a)(2) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928. The return herein, as hereinabove set forth, was filed on the 16th day of July, 1921, and under the Revenue Act of 1918 any additional assessment would necessarily have to be made on or before July 15, 1926, [26] and under the Revenue Act of 1921 any additional assessment would have to be made on or before the 15th day of July, 1925.

(d) The paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the Zellerbach Paper Company, and referred to in the amended petition of Zellerbach Paper Company, petitioner, vs. Commissioner, respondent, Docket No. 39,701 could not under any circumstances extend the time for the making of any additional assessment against the said Zellerbach Paper Company and/or against the A. S. Hopkins Co. beyond December 31, 1925. No assessment has ever been made against the said Zellerbach Paper Company or against the said A. S. Hopkins Co. for additional taxes for the fiscal year ended April 30, 1921, and the deficiency notice was not mailed to this petitioner until May 11, 1928.

(e) It will not be contended herein that any additional tax became due, and it is a fact that no additional tax became due by reason of the adoption of the Revenue Act of 1921, by reason

of any change in the basis of the computation of gross income, or the basis for deductions in arriving at net income, of said Zellerbach Paper Company, and that no additional information that could possibly have been furnished by the said Zellerbach Paper Company and the said A. S. Hopkins Co. would have changed the method of computing the tax due, or would have changed the amount of tax due under the return as filed. The only change made by reason of the adoption of the Revenue Act of 1921 was to eliminate the $2,000.00 exemption allowed to the Zellerbach Paper [27] Company under the Revenue Act of 1918 (or the proper pro rata thereof, The Zellerbach Paper Company having filed a consolidated return), and it therefore became the duty of the Commissioner under Section 250(b) of the Revenue Act of 1921 to examine the return filed by Zellerbach Paper Company, which included the income of A. S. Hopkins Co. for the period in question, and to compute the tax due thereunder. That by reason of this fact the return filed by the said Zellerbach Paper Company on July 16, 1921, under the Revenue Act of 1918 constituted and became a return under the Revenue Act of 1921, adopted on November 23, 1921, and which became retroactive as of January 1st, 1921; that upon the adoption of the Revenue Act of 1921 it became the duty of the Commissioner to compute the tax due from the said Zellerbach Paper Company, or to recompute said tax, if neces-

sary, and to advise the taxpayer, to-wit, Zellerbach Paper Company in relation thereto.

6. WHEREFORE PETITIONER PRAYS that upon an answer being filed by the respondent herein a hearing may be had upon the issues involved, and that upon said hearing the Board find

(a) That the Zellerbach Paper Company filed its income and profits tax return for the fiscal year ended April 30, 1921, on the 16th day of July, 1921, and that said return was neither false nor fraudulent. That said consolidated return contained all items of income and all deductible items, and, further, that said consolidated return contained all other information required by law to be included in [28] its return, and that at the time of the filing of said return the tax due on the net income of the petitioner was correctly computed.

(b) That the Revenue Act of 1921, adopted on the 23rd day of November, 1921, contained no provision making it necessary for the Zellerbach Paper Company to file a new consolidated or other return, and, further, that the only change in said act consisted in eliminating the $2,000.00 exemption (or the proper pro rata of same), to which the Zellerbach Paper Company was entitled under the Revenue Act of 1918, and that it thereupon became the duty of the respondent herein, under Section 250(b) of the Act of 1921, to compute or to recompute the tax due by reason of the elimination of the

exemption as hereinabove set forth, and to notify the taxpayer in relation thereto.

(c) That the return filed by the Zellerbach Paper Company on July 16, 1921, and while the Revenue Act of 1918 was in force, constituted and became a valid return under the Revenue Act of 1921, and that it was unnecessary on the part of the Zellerbach Paper Company to file a new or additional return after the adoption of the Revenue Act of 1921.

(d) That under the Revenue Act of 1918 in effect at the time the return was filed herein, the Commissioner was required to make any additional assessment of taxes claimed within five years after the date of the filing of the return; that under the Revenue Act of 1921 it became necessary for the Commissioner to make any [29] additional assessment within four years after the return of the Zellerbach Paper Company was filed. That no additional assessment was made within the time required by either the Revenue Act of 1918 or the Revenue Act of 1921. That no proceedings were instituted for the collection of any additional taxes within the statutory period, and that the notice of deficiency was not forwarded to the petitioner herein until May 11, 1928. That the time within which any additional assessment might be made against this taxpayer was not extended beyond December 31, 1925, and that by reason of these facts the right of the respondent herein to assess and/or collect any additional taxes

from the petitioner herein was and is barred by the Statute of Limitations. Further, that whatever liability existed, if any, at the time of the adoption of the Revenue Act of 1926, said liability was completely extinguished by reason of the provisions of Section 1106(a) of said Revenue Act of 1926.

(e) That such other and further relief be granted as may be meet and proper in the premises.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California. [30]

State of California,
City and County of San Francisco.—ss.

M. R. Higgins, being duly sworn, says that he is the Vice-President of the Zellerbach Paper Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

M. R. HIGGINS.

Subscribed and sworn to before me this 6th day of March, 1931.

[Seal] LULU A. GODSIL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1931.

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the liability for federal income and profits taxes for the period from November 1, 1920 to April 30, 1921, of A. S. Hopkins Company, dissolved, is as shown below:

Correct tax	$1,744.37
Tax assessed	None
Deficiency in tax if not barred by the Statute of limitations	1,744.37

together with statutory interest thereon to the date of payment.

It is further stipulated and agreed that the aforesaid deficiency in tax and interest for the period ended April 30, 1921, is now due from this petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, unless the collection of said tax is now barred by the statute of limitations. Should the Board find that the collection of the said tax is not barred by the statute of limitations the Board may enter an order finding that in law and in equity there is a deficiency in federal income and profits [32] taxes for the period ended April 30, 1921 in the amount of $1,744.37, together with statutory interest thereon to date of payment, due from the petitioner as transferee under Section 280 of the Rev-

enue Act of 1926 of the assets of said A. S. Hopkins Company, a dissolved corporation.

A. S. Hopkins Company was affiliated with the Zellerbach Paper Company, the National Paper Products Company and the Sanitary Products Corporation during the period from November 1, 1920 to April 30, 1921, under the provisions of Section 240 of the Revenue Acts of 1918 and 1921. The Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) kept their books on the basis of the fiscal year ended April 30, 1921 and filed their return on the basis of the fiscal year ended April 30, 1921. A. S. Hopkins Company filed its return on March 15, 1921, for the calendar year 1920 and included in said return its income for the months of November and December 1920. The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included in the return filed July 16, 1921 by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) under the provisions of the Revenue Act of 1918 covering the fiscal year ended April 30, 1921, which return disclosed a net income in excess of $700,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921, was filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation or the A. S. Hopkins Company (subsidiaries). No returns [33] other than those referred to in this stipulation covering the fiscal year

ended April 30, 1921 or any portion thereof, have been filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation and A. S. Hopkins Company (subsidiaries).

The said return filed by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) (in which was included the income of the A. S. Hopkins Company earned subsequent to December 31, 1920 to April 30, 1921) properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 the said affiliated companies would be entitled to no such exemption for the fiscal year ended April 30, 1921.

The deficiency letter from which this appeal was taken, covering the period from November 1, 1920 to April 30, 1921, was mailed to the petitioner on May 11, 1928 and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the said affiliated companies referred to herein for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy is in excess of $1,000,000.

JOHN FRANCIS NEYLAN
Attorney for Petitioner.

C. M. CHAREST
General Counsel,
Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed March 16, 1931. [31]

[Title of Court and Cause.]

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the amended petition filed by the above-named petitioner, admits and denies as follows:

(A). Denies all the material allegations contained in the first unnumbered paragraph of the amended petition.

(B). Admits all the material allegations contained in the second unnumbered paragraph of the amended petition.

1. Admits all the material allegations contained in paragraph numbered 1 of the amended petition.

2. Admits all the material allegations contained in paragraph numbered 2 of the amended petition.

3. Denies all the material allegations contained in paragraph numbered 3 of the amended petition, except the following allegations which are admitted:

That the taxes in controversy are income and profits taxes for the period from November 1, 1920 to April 30, 1921; that the deficiency in tax for the period from November 1, 1920 to April 30, 1921, if not barred by the statute of limitations, is $1,744.37, which amount is the same [35] as the amount shown in stipulation signed on behalf of the petitioner and the respondent and filed with the Board February 10, 1931; and that the only issue before the Board for decision is whether the deficiency is barred by the statute of limitations.

4. Denies all the material allegations contained in paragraph numbered 4 of the amended petition.

5. Denies all the material allegations contained in paragraph numbered 5 of the amended petition.

6. Denies generally and specifically each and every allegation in the petitioner's amended petition contained not hereinbefore admitted, qualified or denied.

(signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue. [36]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the liability for federal income and profits taxes for the period from November 1, 1920 to April 30, 1921, of A. S. Hopkins Company, dissolved, is as shown below:

Correct tax	$1,744.37
Tax assessed	None
Deficiency in tax if not barred by the Statute of limitations	$1,744.37

together with statutory interest thereon to the date of payment.

It is further stipulated and agreed that the aforesaid deficiency in tax and interest for the period ended April 30, 1921, is now due from this petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, unless the collection of said tax is now barred by the statute of limitations. Should the Board find that the collection of the said tax is not barred by the statute of limitations the Board may enter an order finding that in law and in equity there is a deficiency in federal income and profits [37] taxes for the period ended April 30, 1921 in the amount of $1,744.37, together with statutory interest thereon to date of payment, due from the petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, a dissolved corporation.

A. S. Hopkins Company was affiliated with the Zellerbach Paper Company, the National Paper Products Company and the Sanitary Products Corporation during the period from November 1, 1920 to April 30, 1921, under the provisions of Section 240 of the Revenue Acts of 1918 and 1921. The Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) kept their books on the basis of the fiscal year ended April 30, 1921 and filed their return on the basis of the fiscal year

ended April 30, 1921. A. S. Hopkins Company filed its return on March 15, 1921, for the calendar year 1920 and included in said return its income for the months of November and December 1920. The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included in the return filed July 16, 1921 by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) under the provisions of the Revenue Act of 1918 covering the fiscal year ended April 30, 1921, which return disclosed a net income in excess of $700,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921, was filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation or the A. S. Hopkins Company (subsidiaries). No returns [38] other than those referred to in this stipulation covering the fiscal year ended April 30, 1921 or any portion thereof, have been filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation and A. S. Hopkins Company (subsidiaries).

The said return filed by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) (in which was included the income of the A. S. Hopkins Company earned subsequent to December 31, 1920 to April 30, 1921) properly

showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 the said affiliated companies would be entitled to no such exemption for the fiscal year ended April 30, 1921.

The deficiency letter from which this appeal was taken, covering the period from November 1, 1920 to April 30, 1921, was mailed to the petitioner on May 11, 1928 and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the said affiliated companies referred to herein for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy is in excess of $1,000,000.

(Sgd) JOHN FRANCIS NEYLAN
Attorney for Petitioner.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Feb. 10, 1931. [39]

[Title of Court and Cause.]

MODIFICATION OF STIPULATION.

(Read into record June 10, 1931)

* * * Mr. Cox: At the middle of page 2 of that stipulation, the following language or the following sentence is to be stricken out:

A. S. Hopkins Company filed its return on March 15, 1921, for the calendar year 1920, and included in said return its income for the months of November and December 1920.

In lieu of that sentence there is to be substituted the following sentence:

On March 15, 1921, Zellerbach Paper Company designated itself, Zellerbach Paper Company, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920.

Then in the next sentence on the same page an insertion is to be made whereby that sentence, as corrected, will read:

The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent). [40]

And then continue with the rest of the sentence just as it now stands in the stipulation without further change, the only change being that after the word "included" in that sentence there is to be in-

serted the word "as part of the income of Zellerbach Paper Company".

A true copy. Teste.

[Seal] B. D. GAMBLE
Clerk U. S. Board of Tax Appeals.

[Title of Court and Causes Nos. 39701, 39704, 39715.]

FINDINGS OF FACT AND OPINION.

Promulgated May 17, 1932.

The only return filed for the fiscal year ended April 30, 1921 was one filed July 16, 1921. A credit of $2,000 was taken in this return as allowed by the Revenue Act of 1918. Thereafter the Revenue Act of 1921 was approved under which the taxpayer owed additional tax since it was not entitled to the full credit of $2,000. Held, that the return filed did not start the statutory period of limitations.

John Francis Neylan, Esq., for the petitioners.

H. A. Cox, Esq., and F. R. Shearer, Esq., for the respondent.

The Commissioner determined a deficiency in the income tax liability of Zellerbach Paper Company for the fiscal year ended April 30, 1921. He also determined a deficiency in the liability of National Paper Products Company for the same period. He determined, further, that Zellerbach Paper Company was liable as transferee of the A. S. Hopkins Company for a deficiency in that company's tax liability for the period November 1, 1920, to April 30, 1921. The parties have stipulated the correct amount of the deficiency in each case, and the only

question in controversy is whether or not the deficiencies are barred by the statute of limitations. [42]

FINDINGS OF FACT.

The parties entered into the following stipulations:

Docket No. 39701 Zellerbach Paper Company

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax

Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

Docket No. 39715 National Paper Products Co.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$57,919.10
Tax assessed (allocated)	24,928.92
Deficiency in tax if not barred by the statute of limitations	$32,990.18

[43]

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $200,000. After the en-

actment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $300,000.00

[The two exhibits A mentioned in the above stipulations each waive the time for making assessment of taxes due for the fiscal year ended April 30, 1921 until December 31, 1925.]

Docket No. 39704 Zellerbach Paper Company, Transferee of A. S. Hopkins Co.

The liability for federal income and profits taxes for the period from November 1, 1920 to April 30,

1921, of A. S. Hopkins Company, dissolved, is as shown below:

Correct tax	$1,744.37
Tax assessed	none
Deficiency in tax if not barred by the statute of limitations	$1,744.37

together with statutory interest thereon to the date of payment. [44]

It is further stipulated and agreed that the aforesaid deficiency in tax and interest for the period ended April 30, 1921, is now due from this petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, unless the collection of said tax is now barred by the statute of limitations. Should the Board find that the collection of the said tax is not barred by the statute of limitations the Board may enter an order finding that in law and in equity there is a deficiency in federal income and profits taxes for the period ended April 30, 1921 in the amount of $1,744.37, together with statutory interest thereon to date of payment, due from the petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, a dissolved corporation.

A. S. Hopkins Company was affiliated with the Zellerbach Paper Company, the National Paper Products Company and the Sanitary Products Corporation during the period from November 1, 1920 to April 30, 1921, under the provisions of Section 240 of the Revenue Acts of 1918 and 1921. The

Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) kept their books on the basis of the fiscal year ended April 30, 1921 and filed their return on the basis of the fiscal year ended April 30, 1921. On March 15, 1921, Zellerbach Paper Company designated itself, Zellerbach Paper Company, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920. The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) under the provisions of the Revenue Act of 1918 covering the fiscal year ended April 30, 1921, which return disclosed a net income in excess of $700,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921, was filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation or the A. S. Hopkins Company (subsidiaries). No returns other than those referred to in this stipulation covering the fiscal year ended April 30, 1921 or any portion thereof, have been fied by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Cor-

poration and A. S. Hopkins Company (subsidiaries. [45]

The said return filed by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) (in which was included the income of the A. S. Hopkins Company earned subsequent to December 31, 1920 to April 30, 1921) properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 the said affiliated companies would be entitled to no such exemption for the fiscal year ended April 30, 1921.

The deficiency letter from which this appeal was taken, covering the period from November 1, 1920 to April 30, 1921, was mailed to the petitioner on May 11, 1928 and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the said affiliated companies referred to herein for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy is in excess of $1,000,000.

End of Stipulation

Board's Findings of Fact

The A. S. Hopkins Company maintained its own set of books and records until December 31, 1920. Thereafter, it maintained no separate set of books, and its operations were mingled with those of Zellerbach Paper Company as if it were a branch of the latter company.

On the return for the A. S. Hopkins Company for the calendar year 1920, at page 3, the following question and answer appears:

12. Is over 50 per cent of your outstanding voting capital stock owned by another corporation or by two or more corporations that are affiliated?

The entire capital stock of this Corporation has been bought by the Zellerbach Paper Co. and its entire net assets transferred as of December 31, 1920.

Since the answer to question 12 was in the affirmative, question 14 should have been answered. A proper answer to this question would have shown how the situation changed during the year. This information was not furnished. In the affidavit on this return it was stated to be a return made pursuant to the Revenue Act of 1918. [46]

On the return for the fiscal year ended April 30, 1921 there is no answer to the question "Is this a consolidated return", but the names of the following companies appear at the head of the return: Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation. Questions 11, 12, and 13 were not answered. In question 14, pertaining to affiliations with other corporations, the following question was answered "Yes":

Did substantially the same conditions as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920?

In the schedules attached to this return, information and figures pertaining to each of the three separate companies above named were set out but no

separate information or figures appear in the return pertaining to the A. S. Hopkins Company. This return did not in any way indicate that the A. S. Hopkins Company was one of the affiliated companies for which the return was made nor in any way inform the Commissioner that its income was included in the return. The statement appears in the affidavit supporting this return that it is a return made pursuant to the Revenue Act of 1918.

OPINION.

MURDOCK: The Board has consistently held in situations like the one here present, that a return filed pursuant to the Revenue Act of 1918 is not sufficient to start the period of limitation. The first case of this kind was C. A. Lawton Company, 13 B. T. A. 8, where the Board cited John Wanamaker, Philadelphia, 8 B. T. A. 864, in which a somewhat similar question had been discussed. The other decisions are Hutchinson Company, 14 B. T. A. 367; Valentine-Clark Company, 14 B. T. A. 562 [reversed 52 Fed. (2d) 346]; Gus Holstine Dry Goods Company, 16 B. T. A. [47] 1124; Isaac Goldmann Company, 17 B. T. A. 1103 [reversed 51 Fed. (2d) 427]; Myles Salt Company, Ltd., 18 B. T. A. 742; [reversed 49 Fed. (2d) 232]; Adams, Cushing & Foster, Inc., 19 B. T. A. 89; G. Corrado Coal and Coke Interests, Inc., 19 B. T. A. 691; and E. J. Lorie, et al., 21 B. T. A. 612. Cf. Hill Goldwater, 21 B. T. A. 73, and particularly National Paper Products Company, et al., 26 B. T. A. ..... The Board's reasons for its position are fully set forth in the

above opinions and need not be repeated here. Those decisions are supported by Updike v. United States, 8 Fed. (2d) 913. With all due respect to the Courts of Appeal which have reversed the Board, we adhere to our original position because we still feel that it is the correct one.

The Commissioner would support his determination in these cases on another ground. The A. S. Hopkins Company was affiliated with the other companies from November 1, 1920 until the end of the fiscal period April 30, 1921. The Commissioner contends that its income was never properly reported for this period since its income for November and December, 1920, was reported in a separate return, and its income from January 1, 1921 to April 30, 1921, was included in that of Zellerbach Paper Company without even disclosing that it was so included and without setting forth separately its income and deductions from those of the Zellerbach Paper Company. He cites Commissioner v. Colmer-Green Lumber Company, 49 Fed. (2d) 234 in support of his contention that the statute has not barred him from proceeding further against the Zellerbach Paper Company as a taxpayer and also as a transferee of the assets of A. S. Hopkins Company. The case cited may not be distinguishable from the present case in this connection, but the Board has consistently held that no such segregation in the return is necessary to start the running of the period of limitations. Its [48] first decision to this effect has been affirmed by the Circuit Court of Appeals for the Third Circuit. Stetson & Ellison, 11 B. T. A. 397, affirmed 43

Fed. (2d) 553. See also Peerless Iron Pipe Exchange, Inc., 23 B. T. A. 900.

Reviewed by the Board.

Judgment will be entered under Rule 50.

VAN FOSSAN, dissenting: I am unable to agree with the prevailing opinion in these cases. The conclusions of the Board have been tested by appeal to the courts on three occasions and in each case the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Goldmann Co., 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. I believe the position taken by the Board in these and like cases has been erroneous and that in the instant case the petitioners should prevail.

MARQUETTE agrees with this dissent. [49]

[Title of Court and Cause.]

MOTION.

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in pursuance to the Board's interlocutory decision dated May 17, 1932, and moves that the Board find the deficiencies in respect to the above-named petitioners in the following amounts:

Docket No.	Name	Amount	Year
39701	Zellerbach Paper Co	o. $69,114.02	Fiscal Year April 30, 1921
39704	Zellerbach Paper Co Transferee of A. S	o. S. Hopkins Co. $ 1,744.37	Period Nov. 1, 1920 to April 30, 1921.
39715	National Paper Prod	oducts Company $32,990.18	Fiscal Year April 30, 1921

inasmuch as the Board's decision does not alter the deficiencies as agreed upon in the stipulation of facts heretofore filed in these proceedings.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals.
Filed May 31, 1932. [50]

[Title of Court and Cause.]

NOTICE UNDER RULE 50.

June 3, 1932.

TAKE NOTICE that the Respondent in the above-entitled proceeding filed with the Board on May 31, 1932, a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 9.30 a. m. on June 29, 1932, before a Division of the Board at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquiescence to the entry of a decision based on such computation shall have been filed with the Board.

No further notice of said hearing will be sent.

B. D. GAMBLE,
Clerk.

To: John Francis Neylan, Esq.,
Crocker First National Bank Bldg.,
San Francisco, California. [51]

United States Board of Tax Appeals

Docket No. 39704

ZELLERBACH PAPER COMPANY,
Transferee of A. S. Hopkins Company,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion promulgated May 17, 1932, the respondent, on May 31, 1932 having filed a motion to find the deficiency in the amount agreed upon in the stipulation of facts, and no objection to said motion having been made by the petitioner, after due notice thereof, it is

ORDERED and DECIDED that there is a deficiency for the period November 1, 1920 to April 30, 1921 in the amount of $1,744.37.

[Seal] (Signed) LOGAN MORRIS,
Member,
United States Board of Tax Appeals.

[Endorsed]: Entered Jul. 13, 1932. [52]

[Title of Court and Cause.]

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, by its attorneys, Messrs. John Francis Neylan and J. Paul Miller, and respectfully shows:

I.

Jurisdiction for Review.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision rendered in the above entitled matter by the United States Board of Tax Appeals, entered on the 13th day of July, 1932, redetermining a deficiency in income and profits taxes for the fiscal year ending April 30, 1921, against the above Petitioner, in the sum of $1,744.37. [53]

This Petition for Review is filed in pursuance of the provisions of Section 1001 of the Act of Congress approved on the 26th day of February, 1926, as amended by the Revenue Act of 1928 and the Revenue Act of 1932.

II.

Your Petitioner, Zellerbach Paper Company, is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, State of California.

III.

Nature of Controversy.

For the fiscal year ending April 30, 1921, Petitioner filed a consolidated income and profits tax return on behalf of itself, and its subsidiaries, National Paper Products Company and Sanitary Products Corporation on the 16th day of July, 1921, with the Collector of Internal Revenue for the First District of California, whose office was and is located in the City and County of San Francisco, State of California.

Included in said return was the income of the A. S. Hopkins Company for the period January 1, to April 30, 1921, which company, however, was not engaged in business as a separate entity, but which was being conducted merely as a branch of the Zellerbach Paper Company, which branch was located at Sacramento, California. Prior thereto, to-wit, March 15, 1921, Zellerbach Paper Company had filed an income tax return with the Collector of Internal Revenue at San [54] Francisco, California, as successor to the A. S. Hopkins Company for the calendar year 1920. This return was accepted by the Commissioner; the tax reported therein was paid, and thereafter the return was used as a basis for an examination of the affairs of the A. S. Hopkins Company for the year 1920.

As a result of this examination, the Commissioner of Internal Revenue determined that the income of the A. S. Hopkins Company for the months of November and December, 1920, should have been reported by the Zellerbach Paper Company in its re-

turn filed on July 16, 1921 by reason of the fact that the capital stock of the A. S. Hopkins Company had been acquired by the Zellerbach Paper Company on or about October 31, 1920.

The assets of the A. S. Hopkins Company were transferred to the Zellerbach Paper Company as of December 31st, 1920. Actual dissolution of the company took place some time thereafter. As hereinabove stated, however, the A. S. Hopkins Company was not conducted as a separate entity after December 31, 1920, but merely as one of the numerous branches of the Zellerbach Paper Company. The A. S. Hopkins Company had no separate set of books after December 31, 1920; its operations were mingled with those of Zellerbach Paper Company; it not only was conducted as such, but actually was merely a branch of Zellerbach Paper Company, beginning January 1, 1921. [55]

It will be remembered that the Zellerbach Paper Company had filed a return on behalf of the A. S. Hopkins Company and designating itself as the successor to such company on March 15, 1921, for the calendar year 1920.

This was wholly separate and distinct from the return which the Zellerbach Paper Company later filed, to-wit, on July 16, 1921, on behalf of itself and its two subsidiaries, National Paper Products Company and Sanitary Products Corporation for the fiscal year ending April 30, 1921.

As a result of the examination by the Commissioner of Internal Revenue of these two returns, the

Commissioner concluded that the income of the A. S. Hopkins Company for the months of November and December 1920 should have been included in the return of the Zellerbach Paper Company filed on July 16, 1921.

As a result of this examination, the Commissioner concluded that the Zellerbach Paper Company had overpaid the tax due from the A. S. Hopkins Company for the year 1920 in the sum of $5,127.29, and invited the filing of a claim for refund by the Zellerbach Paper Company on behalf of the A. S. Hopkins Company for this sum, which claim for refund was filed on June 6, 1928, with the Collector of Internal Revenue at San Francisco, California.

The Commissioner also concluded that if the income of the A. S. Hopkins Company for November and December, 1920 [56] had been included in the consolidated return of the Zellerbach Paper Company for the fiscal year ended April 30th, 1921, the additional amount of tax would have amounted to $1,744.37; this is the amount in controversy herein.

It will be noted, therefore, that the Zellerbach Paper Company, by reporting the income of the A. S. Hopkins Company for the entire calendar year 1920 in a separate return, overpaid the tax due from the A. S. Hopkins Company for the period in question by the difference between $5,127.29 (the amount for which the Zellerbach Paper Company was invited by the Commissioner to file a claim for refund) and the sum of $1,744.37 (the amount in controversy herein), to-wit, the sum of $3,382.92. The sum of $5,127.29, for which a claim for refund was filed by

Zellerbach Paper Company at the invitation of the Commissioner, has not been refunded.

The return filed by the Zellerbach Paper Company on July 16, 1921 was filed during the time the act commonly known as the Revenue Act of 1918 was in effect.

Under the provisions of the Revenue Act of 1918 in effect at the time the income and profits tax return hereinabove referred to was filed, a corporate taxpayer was allowed an exemption of $2,000.00.

Under the Revenue Act of 1921, which went into effect on November 23, 1921, this exemption was eliminated [57] if the net income of the corporation was in excess of $25,000.00. The income of Zellerbach Paper Company and its subsidiaries for the fiscal year in question was admittedly in excess of $25,000.00 and as a consequence under the 1921 Act, the Zellerbach Paper Company was not entitled to the exemption of $2,000.00.

The Revenue Act of 1921, which became effective on November 23, 1921, was retroactive as of January 1, 1921 as to certain features thereof. Amongst the retroactive provisions of the Act was the elimination of the $2,000. exemption.

The fiscal year involved herein began May 1, 1920 and ended April 30, 1921. As a result thereof, eight months of the fiscal year fell in the calendar year 1920 and four months fell in the calendar year 1921. The elimination of the $2,000. exemption as hereinabove set forth had the effect of reducing the exemption which the Zellerbach Paper Company and its subsidiaries, whose income was reported

therein, was entitled to take in the filing of its return, to the sum of $1,333.34. The tax was increased thereby in the sum of $66.67.

No return was filed by Zellerbach Paper Company on behalf of itself and its subsidiaries, nor as successors to the A. S. Hopkins Company, other than the return filed on [58] March 15. 1921, and the return filed on July 16, 1921.

The statutory period within which the Commissioner of Internal Revenue might make an additional assessment under the Act of 1918 was five years. This period was reduced, under the Revenue Act of 1921, to four years.

A deficiency letter, i. e., the so-called Sixty Day Letter, was issued to Zellerbach Paper Company, Transferee of A. S. Hopkins Company, by the Commissioner of Internal Revenue, under date of May 11, 1928, attached to which was a "Statement of Tax Liability" wherein it was stated in part, "the adjustments producing the above stated results are shown in schedules attached to a letter addressed to Zellerbach Paper Company, San Francisco, California." This is a reference to a sixty day letter addressed to Zellerbach Paper Company under the same date, to-wit, May 11, 1928, in connection with which a separate Petition for Review is being filed.

An appeal from this sixty day letter was taken to the United States Board of Tax Appeals on the 9th day of July, 1928.

Thereafter, the Commissioner of Internal Revenue filed his Answer to said Petition.

Under date of February 10, 1931, the attorneys

for the respective parties filed with the United States Board [59] of Tax Appeals a stipulation wherein it was agreed that the deficiency in tax, if not barred by the Statute of Limitations, amounted to $1,744.37.

On or about the 16th day of March, 1931, Zellerbach Paper Company (Transferee of A. S. Hopkins Company), filed with the United States Board of Tax Appeals an amended petition, whereupon the Commissioner of Internal Revenue filed his answer to same.

In the answer to the amended Petition filed by the Commissioner herein, it was admitted "that the only issue before the Board for decision is whether the deficiency is barred by the Statute of Limitations;

For the purpose of trial before the United States Board of Tax Appeals, the above-captioned case was consolidated with two additional cases, to-wit, Zellerbach Paper Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals Docket Number 39701, and National Paper Products Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals Docket Number 39715. A joint opinion was rendered by the United States Board of Tax Appeals, and reported in 26 B. T. A. 96. Separate Petitions for Review are being filed, however, in connection with each of these three cases.

The Board of Tax Appeals in its opinion rendered in these cases, recognizes that the identical question has [60] been determined against the Com-

missioner in three cases, to-wit: Myles Salt Company v. Commissioner (C. C. A. 5th) 49 Fed. (2) 232; Isaac Goldman Company v. David Burnet (Court of Appeals of District of Columbia) 51 Fed. (2) 427, and Valentine-Clark Company v. Commissioner (C. C. A. 8th) 52 Fed. (2) 346. Despite this fact, the Board of Tax Appeals refuses to follow the rulings of the courts.

Board of Tax Appeals Member Van Fossan dissented from the majority of the Board, holding that the cases decided by the courts above cited are controlling. Board of Tax Appeals Member Marquette agreed with this dissent.

IV.

Assignments of Error.

The Petitioner states that in the record and proceedings before the Board of Tax Appeals, and in the decision and the final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred which intervened to the prejudice of the Petitioner and the Petitioner assigns the following errors, and each of them, which, it avers, occurred in said record, proceedings, decision and final order of redetermination, and upon which it relies to reverse said decision and final order of redetermination so rendered and returned by the Board of Tax Appeals, to-wit: [61]

(a) The Board of Tax Appeals erred in holding that the collection of the deficiency in question was not barred by the Statute of Limitations;

(b) The Board of Tax Appeals erred in holding that the income and profits tax return for the fiscal year ended April 30, 1921, filed by Zellerbach Paper Company on the 16th day of July, 1921, under the provisions of the Revenue Act of 1918, did not start the running of the period of limitation.

(c) The Board of Tax Appeals erred in failing to hold that the return filed on the 16th day of July, 1921, and hereinabove referred to, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921.

(d) The Board of Tax Appeals erred in holding that the Revenue Act of 1921 required the filing of a new income and profits tax return, which would differ from that filed under the Revenue Act of 1918, only by the elimination of a portion of the $2,000 corporate exemption.

(e) The Board of Tax Appeals erred in finding a deficiency against the Petitioner for the fiscal year ending April 30, 1921, in the sum of $1,744.37.

(f) The Board of Tax Appeals erred in rendering a decision for the Respondent. [62]

WHEREFORE, your Petitioner prays:

(1) That this Honorable Court review the decision of the United States Board of Tax Appeals.

(2) That the transcript of the record be prepared in accordance with the law and with the rules of the United States Circuit Court of Appeals for

the Ninth Circuit, and transmitted to the Clerk of said court for filing.

(3) That appropriate action be taken by this Honorable Court to the end that the errors complained of may be reviewed and corrected.

(4) For such other and further relief as to this Honorable Court may seem fit and proper.

ZELLERBACH PAPER COMPANY,
By THOMAS McLAREN.
JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California. [63]

State of California,
City and County of San Francisco.—ss.

Thomas McLaren, being first duly sworn, deposes and says:

That he is the Vice-President of Zellerbach Paper Company, the Petitioner in the above entitled matter; and that as such he had authority to, and did sign the above and foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except those matters which are therein alleged on information or belief, and that as to those matters he believes it to be true; that the said petition is filed in good faith, and not for the purpose of delay.

THOMAS McLAREN.

Subscribed and sworn to before me this 1st day of October, 1932.

[Seal] LULU A. GODSIL,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1935.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932. [64]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for Respondent.

PLEASE TAKE NOTICE that the above named Petitioner did, on the 4th day of October, 1932, file with the United States Board of Tax Appeals a Petition for Review of the decision of said Board in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which said Petition for Review is hereby served upon you.

(Signed) JOHN FRANCIS NEYLAN,
(Signed) J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

Service of the foregoing Notice and service of a copy of the Petition for Review mentioned in said Notice, is hereby accepted this 4th day of October, 1932.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932 [65]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause came on for hearing before The Honorable E. H. Van Fossan, Member of the United States Board of Tax Appeals, on the 10th day of June, 1931, at Oakland, California, there being present the Petitioner, by its Counsel, Messrs. John Francis Neylan and J. Paul Miller, and the Respondent, by its Counsel, Messrs. H. A. Cox and F. R. Shearer (C. M. Charest, Esq., General Counsel).

Thereupon the following proceedings were had and testimony heard by said Member pertaining to the issues involved in the petition for Review filed with the United States Board of Tax Appeals on the 9th day of July, 1928.

Prior to the introduction of testimony, Counsel for petitioner moved for the consolidation of the above-entitled case for the purpose of the hearing with two additional cases, to-wit, National Paper

Products Company, Petitioner, v. Commissioner of [66] Internal Revenue, Respondent, United States Board of Tax Appeals Docket No. 39715, and Zellerbach Paper Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals No. 39701, which motion was granted.

Thereupon attention was called to the desirability of correcting a certain stipulation which had theretofore been filed in case Docket No. 39704 hereinabove referred to, whereupon the following proceedings took place:—

"Mr. Neylan: Mr. Cox has the language which has been agreed upon.

"Mr. Cox: At the middle of page 2 of that stipulation, the following language or the following sentence is to be stricken out:

'A. S. Hopkins Company filed its return on March 15, 1921, for the calendar year 1920, and included in said return its income for the months of November and December, 1920.'

In lieu of that sentence there is to be substituted the following sentence:

'On March 15, 1921, Zellerbach Paper Company, designated itself, Zellerbach Paper Company, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A.

S. Hopkins Company for the months of November and December, 1920.'

Then in the next sentence on the same page an insertion is to be made whereby that sentence, as corrected, will read:

'The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent).' [67]

And then continue with the rest of the sentence just as it now stands in the stipulation without further change, the only change being that after the word 'included' in that sentence there is to be inserted the words 'as part of the income of Zellerbach Paper Company'.

"The Member: That is in Docket number 39704.

"Mr. Cox: Yes."

Thereupon Petitioner's Counsel offered in evidence the original Income and Profits Tax Return of the Zellerbach Paper Company, the National Paper Products Company, and the Sanitary Products Corporation for the period May 1st, 1920 to the period ended April 30, 1921. In connection with the offer, the following colloquy occurred:

"Mr. Neylan: Now, in relation to the original return in this matter, I assume it is necessary to introduce that in evidence?

"The Member: We have it before us.

"Mr. Neylan: May I ask counsel for the Government if he will agree, without formal proof, that this return which has been handed to me by counsel for the Government is the original return of the Zellerbach Paper Company, the National Paper Products Company, the Sanitary Products Corporation for the period May 1st, 1920, to the period ended April 1st, 1921, and may this be introduced without objection?

"Mr. Cox: May we ask if the signers of the return were officers of all the companies you have named?

"Mr. Neylan: I will have to verify that, Mr. Cox. Mr. Zellerbach, I may say positively, was certainly an officer of the Zellerbach Paper Company, and of National Paper Products.

"The Member: Was he also an officer of Sanitary Products Corporation?

"Mr. Neylan: This is a consolidated return, your Honor. [68]

"Mr. Cox: We agree that this is the original return for whatever it purports to be.

"Mr. Neylan: That is all I want."

The document was received in evidence and marked "Petitioner's Exhibit No. 1." Thereupon Mr. Neylan, counsel for Petitioner, stated: "This is the only return in relation to this matter that this corporation or these corporations ever filed."

Thereupon the following proceedings took place:—

"Mr. Neylan: Your Honor, I would like to

ask at this time if the sixty-day letters in each of these matters which are appended to the petition are considered in evidence and as a part of the record, or is it necessary to introduce them in evidence?

"Mr. Cox: We admitted them to be correct in our answer, did we not?

"Mr. Neylan: I think you did.

* * * * * * *

"Mr. Neylan: As I understand, Government counsel at this time agrees that they may be considered in evidence as the correct sixty-day letters, is that correct, Mr. Cox?

"Mr. Cox: Yes, assuming we admitted them.

"Mr. Neylan: Well, subject to that.

"The Member: If you did not admit them, are you now admitting them?

"Mr. Cox: If your Honor will give me a minute I will see whether we did or not. There was a question as to one of them.

"Mr. Neylan: That was in relation to 1925, Mr. Cox?

"Mr. Cox: Yes, they are all three admitted in the answer.

"The Member: Very well." [69]

Thereupon Counsel for Petitioner made his opening statement, and offered some evidence which was received by the Board, after which Counsel for the Respondent offered in evidence the income and profits tax return of the A. S. Hopkins Company which had been filed by Zellerbach Paper Company as successor to A. S. Hopkins Company, and is the re-

turn referred to in the Stipulation entered into between the parties in Docket No. 39704, which return was received in evidence and marked "Respondent's Exhibit A."

Thereupon the following proceedings took place:—

"Mr. Cox: The position of the respondent in this case is that an additional return was necessary under the law and under the regulations of Commissioner which were authorized by law; and it is also our position that the return filed did not segregate the income of all the companies; in other words, the income of the Hopkins Company was not segregated from the income of the Zellerbach Company, but they were both included as the income of the Zellerbach Company, and the Board in several cases, as I understand, has sustained the position of the Commissioner on this case.

"The Member: How does this case differ from the Myles Salt case?

"Mr. Cox: This differs from the Myles Salt case in the matter that I have just pointed out, and there are probably other matters. We wish, for the purpose of the brief, to analyze the return, and call your Honor's attention to such things as we think mark the distinction between the two cases; but there is that one distinction which I have in mind, that the income of the two companies was not segregated, and under the decision of the Circuit Court of Appeals, for the Fifth Circuit, in Robert H. Lucas, Commissioner, v. Colmer Green Lumber Company, de-

cided April 30, 1931, that was made the basis, as I understand it, of that decision. [70]

"The Member: In that case, as I recall, they held there was not a substantial revelation of the facts necessary to determine the income of each of the corporations.

"Mr. Cox: Yes, of each separate company.

"The Member: And, it therefore, did not comply with their understanding of the statute. It was the same circuit that had the Myles Salt case, was it not?

"Mr. Cox: That was the same Circuit, yes.

"The Member: Is there anything else you wish to submit?

"Mr. Cox: Nothing your Honor."

Thereupon the Petitioner introduced the following testimony in rebuttal:

TESTIMONY OF ALONZO WALLACE HELVERN

Alonzo Wallace Helvern being first duly sworn, on direct examination in substance testified as follows:

My name is Alonzo Wallace Helvern; I reside in San Francisco; my profession is that of a public accountant and tax advisor. I have been a public accountant for ten years; I am now and for a number of years past have been familiar with tax matters; I have been associated with the accounting firm of Lybrand, Ross Bros. & Montgomery for a period of ten years; I am the manager of the Tax Department of this firm at the present time and have been since January 1, 1928. I have had occasion to

(Testimony of Alonzo Wallace Helvern.)

examine the original books and records of account of the Zellerbach Paper Company, National Paper Products Company, and the A. S. Hopkins Company, and I am familiar with the income tax returns of these companies. I heard the point made by Counsel for the Government, Mr. Cox, in connection with the segrega- [71] tion of the income of the A. S. Hopkins Company. I am familiar with the facts in relation to the income of the A. S. Hopkins Company and with the accounting records of Zellerbach Paper Company in relation thereto. My information in relation thereto was gathered in the following manner:

Prior to 1925 I was engaged in auditing rather than income tax work, although income tax work was a part of my duties. I was at that time employed by Lybrand, Ross Bros. & Montgomery and had been engaged by them since January, 1921. Part of my work was the auditing of the accounts of Zellerbach Paper Company. In the ordinary course of my duties as an accountant and as an employee of Lybrand, Ross Bros. & Montgomery I came in contact with the accounts of Zellerbach Paper Company; I was engaged as a senior auditor in the auditing of those accounts.

In relation to the income of A. S. Hopkins Company, beginning with October, 1920, I found that all of the capital stock of the A. S. Hopkins Company, or approximately all of that capital stock was acquired by Zellerbach Paper Company during the month of October, 1920. I found that Zellerbach

(Testimony of Alonzo Wallace Helvern.)

Paper Company continued the A. S. Hopkins Company as a subsidiary maintaining its own set of books and records until December 31, 1920. Thereafter, the A. S. Hopkins Company fully controlled by Zellerbach Paper Company, was continued up to the time of its dissolution as a mere branch of Zellerbach Paper Company and had no separate set of books, its [72] operations being mingled and operated entirely by Zellerbach Paper Company as its own branch. It had no set of books after January 1, 1921. There was no segregation of the income or of the expense of the conducting of the A. S. Hopkins Company; such segregation would have been very impractical, and probably impossible. It was merely a part of Zellerbach Paper Company for accounting purposes.

Thereupon the witness was cross-examined by Government Counsel as follows:

"By Mr. Shearer:

"Q. Now, in regard to the income of the Hopkins Company beginning January 1, 1921, up to the end of the fiscal year that is involved in this case, it is true, is it not, that the Commissioner did determine a substantial income between those periods, January 1, 1921, and the end of this fiscal year, for the Hopkins Company?

"A. If the Commissioner did make such determination, it was not known to me from my subsequent examination of the Revenue Agent's reports and records. There is no indication that

(Testimony of Alonzo Wallace Helvern.)

any segregation was made by the Commissioner, from any knowledge I have after January 1st.

"Mr. Neylan: Here is one letter, November 1, 1920 to April 30th, 1921—is that what you are looking for?

"Mr. Shearer: Yes.

"Mr. Neylan: That includes the months of November and December, 1920, when it had a separate set of books. You will find that in the deficiency letter. I might say to counsel for the Government that the original thirty-day letter of the Commissioner, dated the 27th day of December, 1927, made no segregation to the Hopkins Company. [73]

"Mr. Shearer: Counsel for Petitioner is correct in his statement. I was laboring under a misapprehension. The income set up in the deficiency letter of May 11, 1928, a copy of which is attached to the original petition in Docket No. 39701 shows that the income for the period ended April 30th, as a matter of fact, was two months' income for November and December, 1920.

"No further cross-examination."

The foregoing is the substance of the evidence adduced at the trial of this proceeding pertaining to the issues involved in this appeal.

JOHN FRANCIS NEYLAN.

WCM.

J. PAUL MILLER.

WCM.

(Testimony of Alonzo Wallace Helvern.)

I have no objection to the foregoing statement of the evidence.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Settled and approved this 23rd day of May, 1933.

(Sgd) J. E. MURDOCK,
Member, U. S. Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Lodged May 19, 1933.

[Endorsed]: United States Board of Tax Appeals. Filed May 23, 1933. [74]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the Petition for Review in the above stated case, transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit certified copies of the following documents:

1. The docket entries of all proceedings before the Board of Tax Appeals in the above entitled cause;

2. The Petition of the taxpayer, together with

deficiency letter dated May 11, 1928, attached to which is "Statement of Returns Examined and Resulting Tax Liability;" also deficiency letter issued under date of May 11, 1928, to Zellerbach Paper Company, successor of Petitioners;

3. Answer of Commissioner of Internal Revenue;

4. Stipulation between attorneys for respective parties filed with the Board of Tax Appeals on or about February 10th, 1931; [75]

5. Motion to file Amended Petition and Amended Petition;

6. Commissioner's Answer to Amended Petition;

7. Notice to Produce from Petitioner's Attorney to Attorney for Respondent. (Not of record.)

8. Findings of Fact and Opinion of the Board, including Dissenting Opinion;

9. Motion of Counsel for Respondent to find deficiency in sum of $1,744.37;

10. Notice under Rule 50;

11. Decision of the Board;

12. Petition for Review to the Circuit Court of Appeals for the Ninth Circuit;

13. Notice of Filing of Petition for Review;

14. Petitioner's Exhibit number one, being Income and Profits Tax Return filed by Zellerbach Paper Company on behalf of itself, National Paper Products Company, and Sanitary Products Corporation;

15. Respondent's Exhibit "A", being Income and Profits Tax Return filed by Zellerbach Paper

Company, as successor of A. S. Hopkins Company for calendar year 1920;

16. Statement of Evidence;

17. This Praecipe;

the foregoing to be prepared, certified, and transmitted [76] as required by law and the rules of the Circuit Court of Appeals for the Ninth Circuit.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 31, 1932. [77]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 77, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of June, 1933.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7210. United States Circuit Court of Appeals for the Ninth Circuit. Zellerbach Paper Company, a Corporation, as Transferee of A. S. Hopkins Company, Petitioner, vs. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 3, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7210

United States

Circuit Court of Appeals

For the Ninth Circuit.

ZELLERBACH PAPER COMPANY, a Corporation, as Transferee of A. S. Hopkins Company,
Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.

No. 7210

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit

ZELLERBACH PAPER COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
Board of Tax Appeals Docket No. 39701

NATIONAL PAPER PRODUCTS COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
Board of Tax Appeals Docket No. 39715

ZELLERBACH PAPER COMPANY, as transferee of A. S. Hopkins Company,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
Board of Tax Appeals Docket No. 39704

STIPULATION AND ORDER FOR CONSOLIDATION ON APPEAL.

Whereas, the three above-named cases, upon motion of John Francis Neylan, Counsel for Petitioners,

and consented to by Counsel for Respondent, were consolidated by order of the United States Board of Tax Appeals for trial; and

Whereas, after said trial by the United States Board of Tax Appeals of said consolidated cases, a joint opinion applying to said three cases was rendered by said Board; and

Whereas, petitions for the review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit have been filed by the Petitioners with the Clerk of the United States Board of Tax Appeals, and the appeals perfected; and

Whereas, the same point of law is involved in each of said three cases, to-wit: is the collection from the Petitioners of the additional tax claimed by the Respondent for the fiscal year ending April 30th, 1921, barred by the Statute of Limitations; and

Whereas, it is the opinion of the respective Counsel for the parties to the said three cases that it would most suit their convenience in the handling of the said cases on appeal, and would also be of great assistance to the said United States Circuit Court of Appeals in its determination of said cases, if said cases should be consolidated for purposes of appeal;

It is hereby stipulated by and between John Francis Neylan and J. Paul Miller, Counsel for each of the Petitioners in the above-entitled cases, and C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for the Respondents in each of said cases,

1. That said cases may be consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of oral argument before said Court;

2. That but a single printed transcript of record on appeal be prepared by and printed under the direction of the Clerk of said Court, said Clerk to avoid including in said printed transcript more than one copy of such matters and documents as are duplicated in the certified transcripts of record sent up to him by the Clerk of the United States Board of Tax Appeals;

3. That on all occasions, when pursuant to law or rule of court, the parties to said cases are privileged to file briefs, a single brief, rather than three, may be filed, wherein all matters involved in all of said cases may be discussed and argued;

4. That the said three cases may be heard by the United States Circuit Court of Appeals for the Ninth Circuit upon one oral argument before said Court.

Dated: San Francisco, California, February 1st, 1933.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondents.

It is hereby ordered, that pursuant to the foregoing stipulation, the three above-named cases be

and they are hereby consolidated in accordance with the terms of said stipulation.

Dated: San Francisco, California, March 10, 1933.

CURTIS D. WILBUR,
United States Circuit Judge.

Now, June 20, 1933, the foregoing Stipulation and Order certified from the record as a true copy.

.....

Clerk Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Received Mar. 14, 1933.

[Endorsed]: Filed Jul. 3, 1933. Paul P. O'Brien, Clerk.

[CLERK'S NOTE.]

Pursuant to stipulation of counsel for respective parties, and order of the court thereon, this case was consolidated with its companion case, No. 7209 entitled Zellerbach Paper Company, a corporation, petitioner, against Guy T. Helvering, as Comm'r of Int. Revenue, respondent, for briefing, argument and decision. Accordingly, all proceedings in the Circuit Court of Appeals for the Ninth Circuit in this case will be found at pages 122 to 144, inclusive, of the record in its companion case, and such proceedings, being similar, are not reprinted here in the interest of economy.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7210

ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Feb. 28, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-four pages, numbered from and including 1 to and including 94 to be a full, true and correct copy of the record as filed in this cause in the said Circuit Court of Appeals, together with stipulation and order consolidating this cause with its companion cause for briefing, argument and decision, and judgment filed and entered herein; and that all proceedings in this cause in this court were had jointly with its companion case, and that the proceedings as set forth as part of the record in that case covers these companion cases, and that this record together with the proceedings is a full, true and correct copy of the entire record of the above entitled cause in said Circuit Court of Appeals, excluding original exhibits transmitted herewith, made pursuant to request of counsel for petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, this 28th day of March, 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 97] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

3

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 39

NATIONAL PAPER PRODUCTS COMPANY,
PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1934

CERTIORARI GRANTED JUNE 4, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 39

NATIONAL PAPER PRODUCTS COMPANY,
PETITIONER,

-vs.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1934

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APPEARANCES.

For Taxpayer:

JOHN F. NEYLAN, Esq.,
J. P. MILLER, Esq.,
W. C. MAGATHAN, Esq.

For Comm'r:

H. A. COX, Esq.,
F. R. SHEARER, Esq.,
E. L. CORBIN, Esq.

Docket No. 39715

NATIONAL PAPER PRODUCTS COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES.

Transferred to Mr. Murdock 3/28/32

1928

Jul. 9—Petition received and filed. Taxpayer notified. (Fee paid)

" 10—Copy of petition served on General Counsel.

Aug. 7—Answer filed by General Counsel.

" 9—Copy of answer served on taxpayer. Circuit Calendar.

1931

Feb. 10—Stipulation of facts filed.

Mar. 13—Motion for leave to file amended petition filed by taxpayer, amended petition tendered. 3/16/31 granted. 3/19/31 copy served.

Apr. 24—Hearing set June 10, 1931 at Oakland, California.

May 12—Answer to amended petition filed by General Counsel.

Jun. 10—Hearing held before E. H. Van Fossan, Div. 9, on merits. On motion consolidated for hearing and decision with 39701 and 39704. Briefs due in 60 days.

Jul. 13—Transcript of hearing of June 10, 1931 filed.

Aug. 6—Motion for extension of time to Aug. 31, 1931 to file brief filed by taxpayer. August 8, 1931 granted.

" 7—Motion for extension of 60 days for respondent's brief from Auust 9, 1931 filed.

" 11—Motion for extension of 60 days for respondent's brief granted.

" 31—Brief filed by taxpayer.

Oct. 6—Brief filed by General Counsel.

1932

Jan. 21—Motion for leave to file reply brief filed by taxpayer. Granted 1/29/32.

" 29—Reply brief filed by taxpayer. 1/30/32 copy served.

1932

May 17—Findings of fact and opinion rendered, John E. Murdock, Div. 3. Judgment will be entered under Rule 50.

" 21—Notice of appearance of J. Paul Miller as counsel for taxpayer filed.

" 31—Notice of settlement filed by General Counsel.

Jun. 3—Hearing set June 20, 1932 under Rule 50.

" 29—Hearing had before Miss Matthews on settlement under Rule 50. Not contested. Referred to Mr. Murdock for decision.

Jul. 13—Decision entered, Div. 14, Logan Morris.

Oct. 4—Supersedeas bond in the amount of $66,000.00 approved and filed.

" 4—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 4—Proof of service filed.

" 31—Praecipe filed.

" 31—Proof of service filed. [1*]

Nov. 23—Statement of evidence lodged.

" 23—Notice of lodgment of statement with hearing 12/8/32 filed.

" 30—Objections to statement of evidence filed by General Counsel.

Dec. 2—Order of U. S. Circuit Court of Appeals 9th Circuit extending time to 1/3/33, to transmit record filed.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Dec. 2—Motion for extension to Jan. 6, 1933 for hearing on statement of evidence filed by taxpayer. 12/28/32 granted for hearing Dec. 28, 1932.

" 15—Proof of service of objections filed by General Counsel.

" 27—Order from U. S. Circuit Court of Appeals 9th Circuit extending time to Feb. 3, 1933 to file transcript filed.

" 28—Order continuing hearing to Jan. 11, 1933 on approval of statement of evidence entered.

" 28—Hearing had before Mr. Sternhagen on approval of statement of evidence. On petitioner's motion continued to Jan. 11, 1933.

1933

Jan. 7—Order from Circuit Court of Appeals, 9th Circuit to transmit petitioner's exhibit No. "1" and respondent's Exhibit "A" in original form filed.

" 11—Hearing had before Mr. Arundell, on approval of statement of evidence. Continued to Jan. 25, 1933.

" 11—Motion to postpone hearing filed by petitioner. Granted to 1/25/33.

" 23—Copy of order from 9th Circuit enlarging time to March 3, 1933 to file transcript filed.

" 25—Hearing had before Mr. Marquette on approval of statement of evidence. On

1933

petitioner's motion continued to Feb. 15, 1933.

Feb. 15—Hearing had before Mr. Murdock on approval of statement of evidence. Agreed statement to be filed.

" 28—Copy of order from U. S. Circuit Court of Appeals, 9th Circuit extending time to 4/3/33 to complete record filed.

Mar. 14—Order from U. S. Circuit Court of Appeals, 9th Circuit consolidating with docket 39701 and 39704 to send up one record filed.

Apr. 3—Order from U. S. Circuit Court of Appeals, 9th Circuit extending time to 5/3/33 to complete record filed.

May 4—Order from U. S. Circuit Court of Appeals, extending time to 6/3/33 to complete record filed.

" 8—Hearing had before Mr. J. E. Murdock, Div. 3 on settlement of statement of evidence. Agreed statement to be filed.

" 19—Agreed statement of evidence lodged.

" 19—Amended praecipe filed.

" 19—Proof of service filed.

" 23—Agreed statement of evidence approved and ordered filed.

Jun. 2—Order from U. S. Circuit Court of Appeals 9th Circuit extending time to 7/3/33 to complete record filed.

" 2—Stipulation that transcript of minutes of hearing held 5/8/33 be included in record filed. [2]

United States Board of Tax Appeals

Docket 39715

NATIONAL PAPER PRODUCTS COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:D:60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of California and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on May 11, 1928.

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and for Thirty-one Thousand One Hundred Forty-one and 52/100 Dollars ($31,141.52). [3]

The deficiency of $31,141.52 is a portion of a total deficiency of $96,854.59, assessed by the Com-

missioner of Internal Revenue against Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Company (subsidiary)	31,141.52
A. S. Hopkins Company (subsidiary)	1,688.70
Total deficiency	$96,854.59

The above total deficiency is based upon certain adjustments made by the Commissioner of the consolidated income of Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation and A. S. Hopkins Company. Accordingly, references herein to the petitioner or adjustments of the petitioner's (National Paper Products Company) income will in some cases indicate adjustments applicable to the income of Zellerbach Paper Company as well as the separate income of this petitioner.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

A. ZELLERBACH PAPER COMPANY.

(a) The Commissioner erred in determining the deficiency set forth in his 60-day letter dated May 11, 1928, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, becasue of the assessment of any additional tax for the said fiscal year is barred by

Section 250.(d) of the Revenue Act of 1918; Section 250.(d) . . . . (1) of the Revenue Act of 1921; Section 277.(a) . . . . (1) and Section 277.(a) . . . . (2) of the Revenue Act of 1924; and Section 277.(a) . . . . (2) and Section 277.(a) . . . . (3) of the Revenue Act of 1926.

(b) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in proceeding upon the theory that inasmuch as the petitioner had filed its income tax return under the Revenue Act of 1918, but no additional return was filed by the petitioner under the Revenue Act of 1921, that no statute of limitation applies.

(c) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred by ignoring the fact that inasmuch as there were no items of income or deduction in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and since the rates of income and profits taxes were the same under both Revenue Acts for the fiscal year involved, no additional tax would be shown by the filing of a second return under the 1921 Act; a proper return having been filed under the 1918 Act by this taxpayer. [4]

(d) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $7,293.86 to the

income of Zellerbach Paper Company representing a writedown of the inventory at Batavia, Java, branch from cost to fair market value as at April 30, 1921.

(e) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $2,249.61 to the income of Zellerbach Paper Company representing losses of customers' accounts at Batavia, Java, branch actually determined during the fiscal year ending April 30, 1921.

(f) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $4,167.29 to the income of Zellerbach Paper Company representing an actual loss in value (discovered in February 1928) of an inventory of merchandise as at December 31, 1920, and other assets which had been acquired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing as a deduction from the income of Zellerbach Paper Company $840.00, representing wages paid to the captain of the yacht owned by I. Zellerbach, which yacht was used in connection with the petitioner's business. [5]

B. NATIONAL PAPER PRODUCTS COMPANY

(h) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing $21,421.05, representing write-down of the value of the wood in process inventory of National Paper Products Company at Carthage, New York, from cost to actual market value as at April 30, 1921.

C. CONSOLIDATED INVESTED CAPITAL

(i) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in excluding from the petitioner's consolidated invested capital the amount of $10,000.00, representing the value of certain patents, which value had been substantiated by the taxpayer.

(j) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

[6]

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

The petitioner, National Paper Products Company, is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office at 534 Battery Street, San Francisco, California.

The National Paper Products Company and Sanitary Products Corporation were throughout the fiscal year ended April 30, 1921, wholly owned subsidiaries of Zellerbach Paper Company.

The majority of the capital stock of A. S. Hopkins Company was acquired by the Zellerbach Paper Company on or about October 1, 1920, and the remaining outstanding shares were acquired shortly thereafter, and this subsidiary corporation was dissolved and its assets taken over in liquidation by Zellerbach Paper Company about February 28, 1921, in exchange for the shares of its stock which were cancelled.

The net income of A. S. Hopkins Company for the nine months period ended September 30, 1920, was included in a separate income tax return which was filed with the Collector of Internal Revenue at San Francisco, California, March 15, 1921. The income of A. S. Hopkins Company from and after October 1, 1920, to and including the date of its dissolution, about [7] February 28, 1921, was included in the consoli-

dated income tax return filed by Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921. From and after the date of the liquidation of A. S. Hopkins Company, the business which it had formerly conducted at Sacramento, California, was conducted by Zellerbach Company as its Sacramento branch.

Zellerbach Paper Company filed a consolidated income tax return covering its own income and the income of National Paper Products Company and Sanitary Products Corporation for the fiscal year ended April 30, 1921, and also included therein the income of A. S. Hopkins Company from October 1, 1920 to the date of its dissolution. This consolidated income tax return was correctly prepared in accordance with the provisions of the Revenue Act of 1918, which was the revenue act in effect at the time that the said return was due. The said consolidated income tax return filed on July 15, 1921, was the only income tax return that has been filed by the petitioner. All items of income and expense included in Zellerbach Paper Company's operations and in the operations of its subsidiaries are reflected in the said consolidated income tax return filed on July 15, 1921 and are of such nature that the Revenue Act of 1921 is applicable thereto in exactly the same manner as the Revenue Act of 1918. The petitioner, after the enactment of the Revenue Act

of 1921, did not prepare and file another return; such return, if filed, would have been of exactly the same tenor as [8] the return which had already been filed by the petitioner on July 15, 1921, as the various items of income and the expense included in the operations of Zellerbach Paper Company and its subsidiaries were required to be treated exactly the same under both the Revenue Act of 1918 and the Revenue Act of 1921.

The first deficiency notice for the fiscal year ended April 30, 1921, received by the petitioner from the Commissioner of Internal Revenue was mailed to the petitioner on May 11, 1928, being received by the petitioner several days thereafter.

The said first deficiency notice was mailed more than five years after said consolidated income tax return for the fiscal year ended April 30, 1921 was filed, to-wit; approximately six years and ten months thereafter.

The petitioner has never entered into any agreement in writing or otherwise with the Commissioner of Internal Revenue consenting to a later determination, assessment and/or collection of income or profits taxes or extending the time for said determination, assessment and/or collection of tax to any date beyond the statutory limitations provided by the Revenue Acts applicable to the tax for the fiscal year here in issue. The petitioner has never waived the right

to file a petition with the United States Board of Tax Appeals, nor consented to the assessment and collection of any deficiency in tax for the fiscal year ended April 30, 1921. [9]

During the fiscal year ended April 30, 1921 and for a number of years prior thereto, Zellerbach Paper Company had operated a branch at Batavia, Java. Owing to the business depression in Java in the years 1920, 1921 and 1922 a profit of only $6,977.63 was realized from the operations of this branch for the fiscal year ended April 30, 1921. In the succeeding fiscal year conditions were even worse, and the Batavia branch sustained losses aggregating $11,-351.29. In making determination of the profits of the Batavia branch for the fiscal year ending April 30, 1921, it was necessary to write down certain items in the inventory of merchandise from cost to the market value at April 30, 1921. The aggregate reduction of the inventory thus obtained was $7,293.86. Owing to the depressed business conditions, a review of accounts receivable of the Batavia branch indicated that items aggregating $2,249.61 included therein would be uncollectible, and a reserve was set up to take care of these losses.

The Commissioner in making his determination of the petitioner's income disallowed the $7,293.86 write-down of the inventory and the reserve of $2,249.61 to provide for the losses of accounts, upon the theory that the write-down of

inventory was a mere depreciation of inventory and that the loss of accounts receivable provided for by the reserve was merely an estimated loss.

During the fiscal year ended April 30, 1921, and as at about December 31, 1920, Zellerbach Paper Company [10] received as transferee from A. S. Hopkins Company an inventory of certain merchandise and certain accounts receivable owing to A. S. Hopkins Company and other assets. Certain merchandise of A. S. Hopkins Company having a value of $4,167.29 had been previously transferred to Zellerbach Paper Company and charged to it by the Hopkins Company. At the time of taking over the said assets from A. S. Hopkins Company, the value of this merchandise, $4,167.29, was reflected on the books of the Hopkins Company as an account receivable. Owing to the fact that from about October 1, 1920, Zellerbach Paper Company had been in control of A. S. Hopkins Company, the corresponding credit of $4,167.29 had not been recorded on the books of Zellerbach Paper Company as a liability to A. S. Hopkins Company, although the merchandise received from the Hopkins Company had been included in Zellerbach Paper Company's inventories of merchandise, and, thus, when Zellerbach Paper Company took over all the assets of the Hopkins Company, (including the said account receivable of $4,167.29 on the books of A. S. Hop-

kins Company) the value of this account receivable was, in effect, a duplication in value of certain merchandise included in the merchandise inventories of Zellerbach Paper Company, which duplication in value had been taken up as income.

In February 1921, this duplication was discovered, and the amount of $4,167.29 was charged to Zellerbach Paper Company's surplus account. The Commissioner disallowed this [11] charge of $4,167.29 as a deduction and added it to the taxpayer's net income for the fiscal year ended April 30, 1921.

Mr. I. Zellerbach, during the fiscal year ended April 30, 1921, was, and still is, the president of Zellerbach Paper Company. He was the owner of a yacht which he used for the purpose of entertaining business associates and customers of Zellerbach Paper Company and its subsidiary companies. The wages of the captain of this yacht, $840.00 for the fiscal year ended April 30, 1921, were paid by Zellerbach Paper Company and charged to its expenses. The Commissioner disallowed this expense upon the theory that it was not an ordinary and necessary expense of the business.

The National Paper Products Company, at the close of the fiscal year ended April 30, 1921, in taking its inventory at cost or market, whichever is lower, wrote down the value of its inventory of wood in process at its rossing plant

at Aldrich, New York, in the amount of $21,-421.05. Certain timber had been cut and placed in the rossing process and records had been kept of the various costs applied to this timber in the said process. The wood in the inventory was situated at the company's plant at Aldrich, which was some distance from Carthage, New York, the point at which this wood was to be marketed. To determine a market value applicable to this wood in process at Aldrich, the National Paper Products Company first [12] applied the market price at Carthage and thereafter deducted the transportation and other costs which would have to be incurred in bringing this wood from Aldrich to Carthage.

The Commissioner disallowed the said write-down of the wood inventory on the assumption that the market value had not been substantiated.

As at October 5, 1914, the National Paper Products Company acquired certain patents from the Lazar-Aicher Paper Company in exchange for $100,000 par of the capital stock of the National Paper Products Company. Subsequently, cash expenditures of $3,759.05 were made in perfecting these patents, and additional patents were acquired for $10,000 cash. These patents acquired for capital stock were originally set up on the books of the National Paper Products Company at a value of $100,000. By a subsequent book entry, $90,000 of the patent ac-

count was set up in an account designated "Goodwill". This goodwill of $90,000 was, as at April 30, 1916, written off against surplus.

The Commissioner refused to recognize any value as attaching to the patents acquired for capital stock and excluded the amount of $10,000 at which these patents were carried in the fiscal year ended April 30, 1921, in making his determination of the petitioner's consolidated invested capital. [13]

6. The petitioner prays for relief from the deficiency asserted by the Commissioner in the following and each of the following particulars:

(a) The petitioner prays the Board to find that the assessment of any additional tax for the fiscal year ended April 30, 1921, is barred by Section 250 (d) of the Revenue Act of 1918; Section 250 (d) . . . (1) of the Revenue Act of 1921; Section 277 (a) . . . (1) and Section 277 (a) . . . (2) of the Revenue Act of 1924; and Section 277 (a) . . . (2) and Section 277 (a) . . . (3) of the Revenue Act of 1926.

(b) The petitioner prays the Board to find that the Commissioner erred in proceeding upon the theory that inasmuch as no additional return was filed by the petitioner under the Revenue Act of 1921 after a return under the Revenue Act of 1918 had been filed, no statute of limitation applies.

(c) The petitioner prays the Board to find that there are no items of income or deduction

in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and that the rates of both income tax and excess profits tax for the fiscal year ended April 30, 1921, are the same under the Revenue Acts of 1918 and 1921, and that the filing of [14] an additional return under the Revenue Act of 1921 was not required, as a proper return had been filed under the 1918 Act by the petitioner.

(d) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to write down its inventory at Batavia, Java, branch by $7,293.86, being the excess of cost over its fair market value as at April 30, 1921.

(e) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to charge off as a deduction $2,249.61 representing losses of customers' accounts at Batavia, Java, branch actually determined as at April 30, 1921.

(f) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to deduct therefrom $4,167.29 representing an actual loss in the value of merchandise and other assets which had been ac-

quired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The petitioner prays the Board to find that Zellerbach Paper Company in determining its net income for the fiscal year ended April 30, 1921, is entitled [15] to claim a deduction for $840.00 representing wages paid to the captain of the yacht owned by I. Zellerbach, used in connection with petitioner's business.

(h) The petitioner prays the Board to find that National Paper Products Company in determining its income for the fiscal year ended April 30, 1921, is entitled to a deduction of $21,421.05 representing write-down of the value of its wood in process inventory at Carthage, New York, as at April 30, 1921.

(i) The petitioner prays the Board to find that it is entitled to have included in the consolidated invested capital of Zellerbach Paper Company and subsidiaries for the fiscal year ended April 30, 1921, the amount of $10,000.00 representing the value of certain patents which had been substantiated, but was disallowed by the Commissioner.

(j) The petitioner prays the Board to find that the Commissioner erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of the petitioner's taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

[16]

(k) The petitioner prays for such other and further relief as the nature of the case may require, and which to the Board may seem equitable and proper in the premises.

WHEREFORE, the petitioner prays that the Board may hear and redetermine that there is no deficiency.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner,
Crocker First National Bank Bldg.
San Francisco, California. [17]

State of California,
City and County of San Francisco.—ss.

A. Van der Zwiep, being duly sworn, says that he is the Assistant Secretary of National Paper Products Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

[Seal National Paper Products Co.]

A. VAN DER ZWIEP.

Subscribed and sworn to before me this 5th day of July, 1928.

(Seal) LULU A. GODSIL,
Notary Public.

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires September 13, 1931. [18]

EXHIBIT A

TREASURY DEPARTMENT
Washington

May 11, 1928

IT:CR:D:60D
CAM
National Paper Products Company,
534 Battery Street,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1921 disclosing a deficiency of $31,141.52, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner

of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner
By (Signed) C. B. ALLEN
Deputy Commissioner

BHB-3
Inclosures:
Statement
Form A.
Form 882. [19]

IT:CR:D:60D
CAM

STATEMENT OF RESULTING TAX LIABILITY

Company	Year	Resulting Tax Liability Deficiency
National Paper Products Company	1921	$31,141.52

The adjustments producing the above-stated results are shown in schedules attached to a letter addressed to Zellerbach Paper Company, San Francisco, California.

Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds that no Statute of Limitation applies. [20a]

EXHIBIT A.

TREASURY DEPARTMENT
Washington

May 11, 1928

Office of
Commissioner of Internal Revenue

IT:CR:D:60D
CAM

Zellerbach Paper Company,
534 Battery Place,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1921, discloses a deficiency of $65,024.37, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner.

By (Signed) C. B. ALLEN,
Deputy Commissioner.

Inclosures
Statement.
Form A.
Form 882. [20b]

IT:CR:D:60 D
CAM

STATEMENT OF RETURNS EXAMINED AND RESULTING TAX LIABILITY

Company	Fiscal Year	Form	Deficiency in Tax
Zellerbach Paper Company, San Francisco, Calif.	April 30, 1921	1120 Consolidated	$64,024.37
National Paper Products Company San Francisco, Calif.	April 30, 1921	1120 Consolidated	$31,141.52
A. S. Hopkins Company San Francisco, Calif.	Period Nov. 1, 1920 to April 30, 1921	1120	$ 1,688.70

The adjustments producing the above-stated results are shown in the attached Schedules 1 to 15, inclusive.

The information submitted in your brief dated February 7, 1928, has been carefully considered.

Your contention that "Depreciation on Merchandise" and "Estimated Bad Accounts", included as taxable income in Batavia Branch, were allowable deductions is denied, as your contention is not substantiated.

Your contention that "Inventory Transfer from A. S. Hopkins Company" is an allowable deduction is denied as same is allowed to A. S. Hopkins Company as a deduction, Schedule 6.

Your contention that items charged to dues and subscriptions in the amount of $470.00, are necessary business expenses is allowed for "Membership Fee, Kiwanis Club" and "Subscription to Linweave Association" but denied for "Book Club of California (J. D. Zellerbach)".

Your contention that items charged to headquarters expense are allowable is conceded for the "Cancellation of Contract", but denied for "Salary to captain of J. Zellerbach's private yacht." The mere fact that customers were occasionally entertained on the yacht is not sufficient reason for allowing the deduction.

Your contention relative to the following items, National Paper Products Company is sustained and allowed: [20c]

1. Loss in operation, Brooklyn Soap Plant.
2. Gifts to employees.
3. Unallowable deduction.

Your contention that "Depreciation of Wood Inventory" is allowable is not substantiated.

Your contention for additional depreciation, Carthage Branch has been previously denied for prior years and no evidence having been submitted in your brief to substantiate your claim, the previous denial is sustained.

Your contention that net income for the two months ended December 31, 1920 of A. S. Hopkins Company, should not be included is denied. Evidence shows that the above-named company was affiliated with your company for the period November 1, 1920 to April 30, 1921, accordingly the income for that period is properly income of the consolidation. Adjustment will be made to A. S. Hopkins Company.

Your contention that Patents disallowed from invested capital should be restored in the amount of $10,000.00, has been denied for prior years and that decision is herein sustained.

Your contention for adjustments of taxes prior years and inadmissibles are dependent upon prior years which are still in controversy and no adjustment can be made in this audit.

Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds that no Statute of Limitations applies.

A copy of this letter has been mailed to John Francis Neylan in accordance with the authorization contained in your power of attorney dated March 3, 1925, running to him, which is on file in this office.

[Endorsed]: United States Board of Tax Appeals. Filed July 9, 1928. [20d]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2. Admits the allegations in paragraphs 1 and 2.

3. Admits the allegations in paragraph 3, except that he says the deficiencies therein stated have not been assessed.

5. Admits that the petitioner, the National Paper Products Company, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office at 534 Battery Street, San Francisco, California. Admits that the petitioner, after the enactment of the Revenue Act of 1921, did not file a return for the fiscal year ended April 30, 1921, and further says that petitioner did not at any time file an income and profits tax return for the fiscal year ended April 30, 1921. Admits that

the Commissioner in determining the deficiency set forth in 60-day letter dated May 11, 1928, disallowed certain alleged adjustments to inventory and bad debts and did not recognize any value as attaching to certain patents. Denies the remaining allegations in paragraph 5. [21]

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the petition be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

jdf/7/30/28

[Endorsed]: United States Board of Tax Appeals. Filed Aug. 7, 1928. [22]

[Title of Court and Cause.]

MOTION TO FILE AMENDED PETITION

Now comes NATIONAL PAPER PRODUCTS COMPANY, Petitioner above named, by John Francis Neylan, Esquire, its Counsel, and moves the Board for leave to file an amended petition, same being attached hereto.

JOHN FRANCIS NEYLAN
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed Mar. 13, 1931. [23]

[Title of Court and Cause.]

AMENDED PETITION.

Now comes the above named petitioner and amends its petition heretofore filed in the above entitled matter on the 9th day of July, 1928, said amended petition being prepared and filed in accordance with a stipulation entered into by and between the petitioner and the respondent by their respective counsel, and filed with the Clerk of the Board of Tax Appeals at Washington, D. C., on the 10th day of January, 1931, a copy of which is attached hereto and made a part hereof.

Said petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner

of Internal Revenue in his notice of deficiency (IT:CR:D60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. Petitioner is a corporation organized under the laws of the State of California, and having its principal office and place of business at 534 Battery Street, San Francisco, California. [24]

2. The notice of deficiency, a copy of which is attached to the original petition filed herein, and marked Exhibit "A," and which is incorporated herein by reference thereto, was mailed to the petitioner on May 11, 1928.

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and the amount in controversy as per the notice of deficiency, was the sum of $31,141.52, which, however, has been altered by stipulation of counsel, a copy of which is attached hereto and made a part hereof, and is now the sum of $32,990.18.

The deficiency of $31,141.52 as set forth in the notice of deficiency is a portion of a total deficiency of $96,854.59, assessed by the Commissioner of Internal Revenue against Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Co. (subsidiary)	31,141.52
A. S. Hopkins Co. (Zellerbach Paper Company as Transferee)	1,688.70
Total deficiency	$96,854.59

The petitioner herein alleges that by reason of those certain stipulations filed in this matter, and in the matter of Zellerbach Paper Company, petitioner, versus Commissioner of Internal Revenue, respondent, Docket No. 39,701, and in the matter of Zellerbach Paper Company, Transferee of A. S. Hopkins Co., petitioner, versus, Commissioner of Internal Revenue, respondent, Docket No. 39,704, the amounts now due from the respective taxpayers are as follows: [25]

Zellerbach Paper Company	$69,114.02
National Paper Products Co.	32,990.18
Zellerbach Paper Co. as Transferee of A. S. Hopkins Co.	1,744.37

Provided, however, that the Statute of Limitations does not bar the right of the respondent herein to collect the amounts as hereinabove set forth.

The petitioner alleges therefore that the various items in controversy as set forth in the original petition filed herein have now been adjusted and agreed upon by and between the parties hereto, save and excepting the question as to whether or not the Statute of Limitations bars the right of the respondent herein to collect said additional taxes or any part of same.

4. Petitioner also alleges that the invested capital of the taxpayer for the fiscal year ended April 30, 1921, cannot be determined until it shall have been finally decided whether Zellerbach Paper Company (parent corporation) shall be compelled to pay additional taxes for the fiscal year ended April 30,

1919, in the sum of $137,519.64, and the fiscal year ended April 30, 1920, in the sum of $36,540.10, which matter is now in issue in that certain proceeding pending before the United States Board of Tax Appeals and entitled Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 35599, it being the contention of the said Zellerbach Paper Company that the collection of said taxes for the two fiscal years hereinabove referred to, is barred by the Statute of Limitations. [26]

5. The determination of the tax set forth in the hereinabove mentioned notice of deficiency in the sum of $31,141.52, and the determination of the tax thereafter by the respondent herein, in the sum of $32,990.18, is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, by reason of the fact that the assessment of any additional tax for said fiscal year was and is barred by Sections 250(d) of the Revenue Act of 1918, 250(d) (1) of the Revenue Act of 1921, Section 277(a) (1) and Section 277(a) (2) of the Revenue Act of 1924, and Section 277(a) (2), Section 277(a) (3) and Section 1106(a) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928.

(b) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred in proceeding upon the theory that inasmuch as Zellerbach Paper Company had filed its income tax return under the Revenue Act of 1918, but no additional return was filed under the Revenue Act of 1921, no Statute of Limitation applies. [27]

(c) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred by ruling that an additional return was necessary under the Revenue Act of 1921, inasmuch as there were no items of income or deduction in the consolidated return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921.

(d) The Commissioner erred in failing to include as a part of the invested capital of Zellerbach Paper Company (parent corporation) for the fiscal year ended April 30, 1921, the sum of $137,519.64, claimed by the respondent herein to be due as additional taxes for the fiscal year ended April 30, 1919; the Commissioner also erred in failing to include in the invested capital of Zellerbach Paper Company (parent corporation) for the fiscal year ended April 30, 1921, the proper pro rata portion of the sum of $36,540.10, claimed as additional taxes due from

the said Zellerbach Paper Company for the fiscal year ended April 30, 1920, and erred in failing to allow this petitioner as part of its invested capital the proper pro rata portion of the sum of $36,540.10. Petitioner alleges in connection therewith that the said Zellerbach Paper Company [28] (parent corporation) was not and is not liable for either the sum of $137,519.64, or the sum of $36,540.10, or any part of said sums for the fiscal years ended April 30, 1919, and April 30, 1920, respectively, on the ground that the claims of the Commissioner of Internal Revenue for said sums are barred by the Statute of Limitations, all as more fully set forth in that certain proceeding pending before the United States Board of Tax Appeals, being entitled Zellerbach Paper Company, petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 35599.

6. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) Zellerbach Paper Company, a corporation, filed a consolidated return on its own behalf and on behalf of the petitioner herein for the fiscal year ended April 30, 1921, on July 16, 1921, as evidenced by the stipulation filed herein, a copy of which is attached hereto, which return was neither false nor fraudulent. This return was filed under the Revenue Act of 1918, which was in effect until the adoption of the Revenue Act of 1921 on November 23, 1921.

(b) Under the Revenue Act of 1918 any additional assessment was required to be made within five years after the date of the filing of the return. This is provided in Section 250(d) of the Revenue Act of 1918, and carried forward under Section 250(d)(1) of the Revenue Act of [29] 1921, Section 277(a) (2) of the Revenue Act of 1924, Section 277(a) (3) of the Revenue Act of 1926, and Section (1) of the Revenue Act of 1928. The Revenue Act of 1921 provided that any assessment of any additional taxes for the taxable year 1921, or succeeding taxable years, should be determined and assessed by the Commissioner within four years after the return was filed. This was carried forward under Section 277(a)(1) of the Revenue Act of 1924, Section 277(a)(2) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928. The return herein, as hereinabove set forth, was filed on the 16th day of July, 1921, and under the Revenue Act of 1918 any additional assessment would necessarily have to be made on or before July 15, 1926, and under the Revenue Act of 1921 any additional assessment would have to be made on or before the 15th day of July, 1925.

(c) The paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the Petitioner and Respondent, and attached to the stipulation filed herein, and marked Exhibit "A," could not, under any circumstances, extend the time for the making of any addi-

tional assessment beyond December 31, 1925. No assessment has ever been made against the petitioner herein for additional taxes for the fiscal year ended April 30, 1921, and the deficiency notice was not mailed to the petitioner until May 11, 1928.

(d) It will not be contended herein that any additional tax became due, and it is a fact that no additional tax [30] became due by reason of the adoption of the Revenue Act of 1921, by reason of any change in the basis for the computation of gross income, or the basis for deductions in arriving at net income, and no additional information that could possibly have been furnished by the taxpayer herein would have changed the method of computing the tax due, or would have changed the amount of tax due under the return as filed. The only change made by reason of the adoption of the Revenue Act of 1921 was to eliminate the $2,000.00 exemption allowed to this Petitioner under the Revenue Act of 1918 (or the proper pro rata thereof, a consolidated return having been filed by the Zellerbach Paper Company, which included the income of petitioner herein), and it therefore became the duty of the Commissioner under Section 250(b) of the Revenue Act of 1921 to examine the return and to compute the tax due thereunder. That by reason of this fact the consolidated return filed by Zellerbach Paper Company, including the income of this petitioner, on July 16, 1921, under the Revenue Act

of 1918, constituted and became a return under the Revenue Act of 1921, adopted on November 23, 1921, and which became retroactive as of January 1st, 1921; that upon the adoption of the Revenue Act of 1921 it became the duty of the Commissioner to compute the tax due from this Petitioner, or to recompute said tax, if necessary, and to advise the taxpayer in relation thereto. [31]

(e) The facts in relation to the invested capital of the petitioner for the fiscal year ended April 30, 1921, are as follows: There is now pending before the United States Board of Tax Appeals the matter of Zellerbach Paper Company, petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket Number 35599, and involving amongst other matters the question as to whether the said Zellerbach Paper Company is liable for additional taxes in the sum of $137,519.64 for the fiscal year ended April 30, 1919, and the additional sum of $36,-540.10 for the fiscal year ended April 30, 1920.

In determining the invested capital of the Zellerbach Paper Company and of the petitioner herein for the fiscal year ended April 30, 1921, the Commissioner of Internal Revenue deducted therefrom the sum of $137,519.53, representing the deficiency claimed from the Zellerbach Paper Company for the fiscal year ended April 30, 1919, and the pro rata portion of the sum of $36,540.10 representing the deficiency claimed from the Zellerbach Paper Company for the

fiscal year ended April 30, 1920, which latter was based upon the theory that the Zellerbach Paper Company and the petitioner herein would have been required to pay said deficiency claimed for the fiscal year ended April 30, 1920, in four quarterly installments as provided by the Revenue Act of 1918 in effect at that time. If it should be held that the collection of the said sum of $137,519.64 and/or the sum of $36,540.10 is barred by the Statute of Limitations, [32] (and it is the contention of the said Zellerbach Paper Company and this petitioner that the collection of both of said sums is so barred), the sum of $137,519.64, and the proper pro rata portion of the said sum of $36,540.10 should be included in the invested capital of Zellerbach Paper Company, and the proper pro rata portion thereof should be included in the invested capital of this petitioner for the fiscal year ended April 30, 1921.

7. WHEREFORE PETITIONER PRAYS that upon an answer being filed by the respondent herein a hearing may be had upon the issues involved, and that upon said hearing the Board find

(a) That the Zellerbach Paper Company filed on its behalf and on behalf of petitioner herein its income and profits tax return for the fiscal year ended April 30, 1921, on the 16th day of July, 1921, and that said return was neither false nor fraudulent. That said consolidated return contained all items of income and all deductible items, and, further, that said consolidated re-

turn contained all other information required by law to be included in its return, and that at the time of the filing of said return the taxes due on the net income of the petitioner was correctly computed.

(b) That the Revenue Act of 1921, adopted on the 23rd day of November, 1921, contained no provision making it necessary for the petitioner herein to file a new consolidated or other return, and, further, that the only change in said act consisted in eliminating the $2,000.00 exemption (or the proper pro rata of same), to which this [33] petitioner was entitled under the Revenue Act of 1918, and that it thereupon became the duty of the respondent herein, under Section 250(b) of the Act of 1921, to compute or to recompute the tax due by reason of the elimination of the exemption as hereinabove set forth, and to notify the taxpayer in relation thereto.

(c) That the return filed by the petitioner herein on July 16, 1921, and while the Revenue Act of 1918 was in force, constituted and became a valid return under the Revenue Act of 1921, and that it was unnecessary on the part of this petitioner to file a new or additional return after the adoption of the Revenue Act of 1921.

(d) That under the Revenue Act of 1918 in effect at the time the return was filed herein, the Commissioner was required to make any additional assessment of taxes claimed within

five years after the date of the filing of the return; that under the Revenue Act of 1921 it became necessary for the Commissioner to make any additional assessment within four years after the return of the petitioner herein was filed. That no additional assessment was made within the time required by either the Revenue Act of 1918 or the Revenue Act of 1921. That no proceedings were instituted for the collection of any additional taxes within the statutory period, and that the notice of deficiency was not forwarded to the petitioner herein until May 11, 1928. That the time within which any additional assessment might be made against this taxpayer was not extended beyond December [34] 31, 1925, and that by reason of these facts the right of the respondent herein to assess and/or collect any additional taxes from the petitioner herein was and is barred by the Statute of Limitations. Further, that whatever liability existed, if any, at the time of the adoption of the Revenue Act of 1926, said liability was completely extinguished by reason of the provisions of Section 1106(a) of said Revenue Act of 1926.

(e) That if it should be held that the Statute of Limitations does not bar the right of the respondent to collect additional taxes for the fiscal year ended April 30, 1921, that the invested capital of the petitioner for said fiscal year, be adjusted in accordance with the final decision as

to the collectibility of any additional taxes from the said Zellerbach Paper Company for the fiscal year ended April 30, 1919, and for the fiscal year ended April 30, 1920, which issues are involved in that certain proceeding entitled Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, pending before the United States Board of Tax Appeals, Docket Number 35599.

(g) That such other and further relief be granted as may be meet and proper in the premises.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California. [35]

State of California,
City and County of San Francisco.—ss.

M. R. Higgins, being duly sworn, says that he is the Vice-President of the National Paper Products Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

M. R. HIGGINS.

Subscribed and sworn to before me this 6th day of March, 1931.

[Seal] LULU A. GODSIL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1931. [36]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the facts herein agreed to may be considered as true by the United States Board of Tax Appeals for the purpose of determining the issues involved in this appeal.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$57,919.10
Tax assessed (allocated)	24,928.92
Deficiency in tax if not barred by the statute of limitations	$32,990.18

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $200,000.00. After the

enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the [37] Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A."

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $300,000.00.

JOHN FRANCIS NEYLAN
Attorney for Petitioner.

C. M. CHAREST
General Counsel,
Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed March 16, 1931. [38]

[Title of Court and Cause.]

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the amended petition filed by the above-named petitioner, admits and denies as follows:

(A). Denies all the material allegations contained in the first unnumbered paragraph of the amended petition.

(B). Admits all the material allegations contained in the second unnumbered paragraph of the amended petition.

1. Admits all the material allegations contained in paragraph numbered 1 of the amended petition.

2. Admits all the material allegations contained in paragraph numbered 2 of the amended petition.

3. Denies all the material allegations contained in paragraph numbered 3 of the amended petition, except the allegations that the taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921 and the allegation that the deficiency in tax for the fiscal year ended April 30, 1921, if not barred by the statute of limitations, is $32,990.18, which amount is the same as the amount shown in a [39] stipulation signed on behalf of the petitioner and the respondent and filed with the Board February 10, 1931.

4. Denies all the material allegations contained in paragraph numbered 4 of the amended petition.

5. Denies all the material allegations contained in paragraph numbered 5 of the amended petition.

6. Denies all the material allegations contained in paragraph numbered 6 of the amended petition.

7. Denies generally and specifically each and every allegation in the petitioner's amended petition contained not hereinbefore admitted, qualified or denied.

(signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed May 12, 1931. [40]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the facts herein agreed to may be considered as true by the United States Board of Tax Appeals for the purpose of determining the issues involved in this appeal.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$57,919.10
Tax assessed (allocated)	24,928.92
Deficiency in tax if not barred by the statute of limitations	$32,990.18

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $200,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed [41] by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $300,000.00.

(Sgd) JOHN FRANCIS NEYLAN
Attorney for Petitioner.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Feb. 10, 1931. [42]

EXHIBIT A

(510M)
IT:EN:T:WR

Docket No. 39715

February 27th, 1925.

INCOME AND PROFITS TAX WAIVER

(For taxable years ended prior to March 1, 1921.)
Zellerbach Paper Co. (parent)

In pursuance of the provisions of existing Internal Revenue Laws National Paper Company, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the fiscal year ended April 30, 1921 under existing revenue acts, or un-

der prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

[Seal] NATIONAL PAPER PRODUCTS COMPANY
Taxpayer
By M. R. HIGGINS,
President.
D. H. BLAIR,
S. M. G.
Commissioner.

Attest:
A. D. ELLIS,
Secretary.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

C. A. S. Engineering Division.

Received Mar. 6, 1925. [43]

A true copy. Teste.

[Seal] B. D. GAMBLE

Clerk U. S. Board of Tax Appeals.

[Title of Court and Causes Nos. 39701, 39704, 39715.]

FINDINGS OF FACT AND OPINION.

Promulgated May 17, 1932.

The only return filed for the fiscal year ended April 30, 1921 was one filed July 16, 1921. A credit of $2,000 was taken in this return as allowed by the Revenue Act of 1918. Thereafter the Revenue Act of 1921 was approved under which the taxpayer owed additional tax since it was not entitled to the full credit of $2,000. Held, that the return filed did not start the statutory period of limitations.

John Francis Neylan, Esq., for the petitioners.

H. A. Cox, Esq., and F. R. Shearer, Esq., for the respondent.

The Commissioner determined a deficiency in the income tax liability of Zellerbach Paper Company for the fiscal year ended April 30, 1921. He also determined a deficiency in the liability of National Paper Products Company for the same period. He determined, further, that Zellerbach Paper Company was liable as transferee of the A. S. Hopkins Company for a deficiency in that company's tax liability for the period November 1, 1920, to April 30, 1921. The parties have stipulated the correct amount of the deficiency in each case, and the only question in controversy is whether or not the deficiencies are barred by the statute of limitations. [44]

FINDINGS OF FACT.

The parties entered into the following stipulations:

Docket No. 39701 Zellerbach Paper Company

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

Docket No. 39715 National Paper Products Co.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$57,919.10
Tax assessed (allocated)	24,928.92
Deficiency in tax if not barred by the statute of limitations	$32,990.18

[45]

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $200,000. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30,

1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $300,000.00

[The two exhibits A mentioned in the above stipulations each waive the time for making assessment of taxes due for the fiscal year ended April 30, 1921 until December 31, 1925.]

Docket No. 39704 Zellerbach Paper Company, Transferee of A. S. Hopkins Co.

The liability for federal income and profits taxes for the period from November 1, 1920 to April 30, 1921, of A. S. Hopkins Company, dissolved, is as shown below:

Correct tax	$1,744.37
Tax assessed	none
Deficiency in tax if not barred by the statute of limitations	$1,744.37

together with statutory interest thereon to the date of payment. [46]

It is further stipulated and agreed that the aforesaid deficiency in tax and interest for the period ended April 30, 1921, is now due from this petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, unless the collection of said tax is now barred by the statute of limitations. Should the Board find that the collection of the said tax is not barred by the statute of limitations the Board may enter an order finding that in law and in equity there is a deficiency in federal income and profits taxes for the period ended April 30, 1921 in the amount of $1,744.37, together with statutory interest thereon to date of payment, due from the petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, a dissolved corporation.

A. S. Hopkins Company was affiliated with the Zellerbach Paper Company, the National Paper Products Company and the Sanitary Products Corporation during the period from November 1, 1920 to April 30, 1921, under the provisions of Section 240 of the Revenue Acts of 1918 and 1921. The Zellerbach Paper Company (parent), the National

Paper Products Company and the Sanitary Products Corporation (subsidiaries) kept their books on the basis of the fiscal year ended April 30, 1921 and filed their return on the basis of the fiscal year ended April 30, 1921. On March 15, 1921, Zellerbach Paper Company designated itself, Zellerbach Paper Company, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920. The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) under the provisions of the Revenue Act of 1918 covering the fiscal year ended April 30, 1921, which return disclosed a net income in excess of $700,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921, was filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation or the A. S. Hopkins Company (subsidiaries). No returns other than those referred to in this stipulation covering the fiscal year ended April 30, 1921 or any portion thereof, have been fied by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Cor-

poration and A. S. Hopkins Company (subsidiaries. [47]

The said return filed by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) (in which was included the income of the A. S. Hopkins Company earned subsequent to December 31, 1920 to April 30, 1921) properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 the said affiliated companies would be entitled to no such exemption for the fiscal year ended April 30, 1921.

The deficiency letter from which this appeal was taken, covering the period from November 1, 1920 to April 30, 1921, was mailed to the petitioner on May 11, 1928 and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the said affiliated companies referred to herein for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy is in excess of $1,000,000.

The A. S. Hopkins Company maintained its own set of books and records until December 31, 1920. Thereafter, it maintained no separate set of books, and its operations were mingled with those of Zellerbach Paper Company as if it were a branch of the latter company.

On the return for the A. S. Hopkins Company for the calendar year 1920, at page 3, the following question and answer appears:

12. Is over 50 per cent of your outstanding voting capital stock owned by another corporation or by two or more corporations that are affiliated?

The entire capital stock of this Corporation has been bought by the Zellerbach Paper Co. and its entire net assets transferred as of December 31, 1920.

Since the answer to question 12 was in the affirmative, question 14 should have been answered. A proper answer to this question would have shown how the situation changed during the year. This information was not furnished. In the affidavit on this return it was stated to be a return made pursuant to the Revenue Act of 1918. [48]

On the return for the fiscal year ended April 30, 1921 there is no answer to the question "Is this a consolidated return", but the names of the following companies appear at the head of the return: Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation. Questions 11, 12, and 13 were not answered. In question 14, pertaining to affiliations with other corporations, the following question was answered "Yes":

Did substantially the same conditions as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920?

In the schedules attached to this return, information and figures pertaining to each of the three separate companies above named were set out but no

separate information or figures appear in the return pertaining to the A. S. Hopkins Company. This return did not in any way indicate that the A. S. Hopkins Company was one of the affiliated companies for which the return was made nor in any way inform the Commissioner that its income was included in the return. The statement appears in the affidavit supporting this return that it is a return made pursuant to the Revenue Act of 1918.

OPINION.

MURDOCK: The Board has consistently held in situations like the one here present, that a return filed pursuant to the Revenue Act of 1918 is not sufficient to start the period of limitation. The first case of this kind was C. A. Lawton Company, 13 B. T. A. 8, where the Board cited John Wanamaker, Philadelphia, 8 B. T. A. 864, in which a somewhat similar question had been discussed. The other decisions are Hutchinson Company, 14 B. T. A. 367; Valentine-Clark Company, 14 B. T. A. 562 [reversed 52 Fed. (2d) 346]; Gus Holstine Dry Goods Company, 16 B. T. A. [49] 1124; Isaac Goldmann Company, 17 B. T. A. 1103 [reversed 51 Fed. (2d) 427]; Myles Salt Company, Ltd., 18 B. T. A. 742; [reversed 49 Fed. (2d) 232]; Adams, Cushing & Foster, Inc., 19 B. T. A. 89; G. Corrado Coal and Coke Interests, Inc., 19 B. T. A. 691; and E. J. Lorie, et al., 21 B. T. A. 612. Cf. Hill Goldwater, 21 B. T. A. 73, and particularly National Paper Products Company, et al., 26 B. T. A. ..... The Board's

reasons for its position are fully set forth in the above opinions and need not be repeated here. Those decisions are supported by Updike v. United States, 8 Fed. (2d) 913. With all due respect to the Courts of Appeal which have reversed the Board, we adhere to our original position because we still feel that it is the correct one.

The Commissioner would support his determination in these cases on another ground. The A. S. Hopkins Company was affiliated with the other companies from November 1, 1920 until the end of the fiscal period April 30, 1921. The Commissioner contends that its income was never properly reported for this period since its income for November and December, 1920, was reported in a separate return, and its income from January 1, 1921 to April 30, 1921, was included in that of Zellerbach Paper Company without even disclosing that it was so included and without setting forth separately its income and deductions from those of the Zellerbach Paper Company. He cites Commissioner v. Colmer-Green Lumber Company, 49 Fed. (2d) 234 in support of his contention that the statute has not barred him from proceeding further against the Zellerbach Paper Company as a taxpayer and also as a transferee of the assets of A. S. Hopkins Company. The case cited may not be distinguishable from the present case in this connection, but the Board has consistently held that no such segregation in the return is necessary to start the running of the period of limitations. Its [50] first decision to this effect has been affirmed

by the Circuit Court of Appeals for the Third Circuit. Stetson & Ellison, 11 B. T. A. 397, affirmed 43 Fed. (2d) 553. See also Peerless Iron Pipe Exchange, Inc., 23 B. T. A. 900.

Reviewed by the Board.

Judgment will be entered under Rule 50.

VAN FOSSAN, dissenting: I am unable to agree with the prevailing opinion in these cases. The conclusions of the Board have been tested by appeal to the courts on three occasions and in each case the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Goldmann Co., 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. I believe the position taken by the Board in these and like cases has been erroneous and that in the instant case the petitioners should prevail.

MARQUETTE agrees with this dissent. [51]

[Title of Court and Cause.]

MOTION.

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in pursuance to the Board's interlocutory decision dated May 17, 1932, and moves that the Board find the deficiencies in respect to the above-named petitioners in the following amounts:

Docket No.	Name	Amount	Year
39701	Zellerbach Paper Co.	$69,114.02	Fiscal Year April 30, 1921
39704	Zellerbach Paper Co. Transferee of A. S. Hopkins Co.	$ 1,744.37	Period Nov. 1, 1920 to April 30, 1921.
39715	National Paper Products Company	$32,990.18	Fiscal Year April 30, 1921

inasmuch as the Board's decision does not alter the deficiencies as agreed upon in the stipulation of facts heretofore filed in these proceedings.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals.
Filed May 31, 1932. [52]

[Title of Court and Cause.]

NOTICE UNDER RULE 50.

June 3, 1932.

TAKE NOTICE that the Respondent in the above-entitled proceeding filed with the Board on May 31, 1932, a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 9.30 a. m. on June 29, 1932, before a Division of the Board at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquiescence to the entry of a decision based on such computation shall have been filed with the Board.

No further notice of said hearing will be sent.

B. D. GAMBLE,
Clerk.

To: John Francis Neylan, Esq.,
Crocker First National Bank Bldg.,
San Francisco, California. [53]

United States Board of Tax Appeals

Docket No. 39715

NATIONAL PAPER PRODUCTS COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion promulgated May 17, 1932, the respondent, on May 31, 1932 having filed a motion to find the deficiency in the amount agreed upon in the stipulation of facts, and no objection to said motion having been made by the petitioner, after due notice thereof, it is

ORDERED and DECIDED that there is a deficiency for the fiscal year ended April 30, 1921 in the amount of $32,990.18.

[Seal] (Signed) LOGAN MORRIS,
Member,
United States Board of Tax Appeals.

[Endorsed]: Entered Jul. 13, 1932. [54]

[Title of Court and Cause.]

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes National Paper Products Company, by its attorneys, Messrs. John Francis Neylan and J. Paul Miller, and respectfully shows:

I.

Jurisdiction for Review.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision rendered in the above entitled matter by the United States Board of Tax Appeals, entered on the 13th day of July, 1932, redetermining a deficiency in income and profits taxes for the fiscal year ending April 30, 1921, against the above Petitioner, in the sum of $32,990.18. [55]

This Petition for Review is filed in pursuance of the provisions of Section 1001 of the Act of Congress approved on the 26th day of February, 1926, as amended by the Revenue Act of 1928 and the Revenue Act of 1932.

II.

Your Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, State of California.

For the fiscal year ending April 30, 1921, Zellerbach Paper Company, of which your petitioner was and is a subsidiary, filed a consolidated income and profits tax return on behalf of the said Zellerbach Paper Company, the Sanitary Products Corporation, and your Petitioner, on the 16th day of July, 1921, with the Collector of Internal Revenue for the First District of California, whose office was and is located in the City and County of San Francisco, State of California.

III.

Nature of Controversy.

The nature of the controversy is as follows:

On July 16, 1921 Zellerbach Paper Company, of which your Petitioner was and is a subsidiary, filed a consolidated income and profits tax return on behalf of the said [56] Zellerbach Paper Company, the Sanitary Products Corporation, and your Petitioner, with the Collector of Internal Revenue for the First District of California, at San Francisco, California, for the fiscal year ended April 30th, 1921.

This return was filed during the time the Act commonly known as the Revenue Act of 1918 was in effect.

Under the provisions of the Revenue Act of 1918 in effect at the time the income and profits tax return hereinabove referred to was filed, a corporate taxpayer was allowed an exemption of $2,000.00.

Under the Revenue Act of 1921, which went into effect on November 23, 1921, this exemption was

eliminated if the net income of the corporation was in excess of $25,000.00. The income of Zellerbach Paper Company and its subsidiaries for the fiscal year in question was admittedly in excess of $25,000.00 and as a consequence under the 1921 Act, the Zellerbach Paper Company was not entitled to the exemption of $2,000.00.

The Revenue Act of 1921, which became effective on November 23, 1921, was retroactive as of January 1, 1921 as to certain features thereof. Amongst the retroactive provisions of the Act was the elimination of the $2,000. exemption.

The fiscal year involved herein began May 1, 1920 and ended April 30, 1921. As a result thereof, eight [57] months of the fiscal year fell in the calendar year 1920 and four months fell in the calendar year 1921. The elimination of the $2,000. exemption as hereinabove set forth had the effect of reducing the exemption which the Zellerbach Paper Company and its subsidiaries, whose income was reported therein, was entitled to take in the filing of its return, to the sum of $1,333.34. The tax was increased thereby in the sum of $66.67.

No additional return was filed by or on behalf of the National Paper Products Company (or the Zellerbach Paper Company) for the fiscal year ending April 30, 1921, other than the return hereinabove mentioned.

The statutory period within which the Commissioner of Internal Revenue might make an additional assessment under the Act of 1918 was five

years. This period was reduced, under the Revenue Act of 1921, to four years.

Under date of February 27, 1925, the National Paper Products Company executed an "Income and Profits Tax Waiver" extending the time within which the Commissioner of Internal Revenue might make an additional assessment to December 31, 1925. No other waiver was executed.

A deficiency letter, i. e., the so-called Sixty Day Letter, was issued to your Petitioner herein by the Commissioner of Internal Revenue under date of May 11, 1928, [58] attached to which was a "Statement of Resulting Tax Liability" wherein reference was made to an additional sixty day letter addressed to Zellerbach Paper Company, the parent of the National Paper Products Company.

An appeal from this sixty day letter was taken to the United States Board of Tax Appeals on the 9th day of July, 1928.

Thereafter, the Commissioner of Internal Revenue filed his Answer to said Petition.

Under date of February 10, 1931, the attorneys for the respective parties filed with the United States Board of Tax Appeals a stipulation wherein it was agreed that the deficiency in tax, if not barred by the Statute of Limitations, amounted to $32,990.18.

On or about the 16th day of March, 1931, the taxpayer, National Paper Products Company, filed with the United States Board of Tax Appeals an amended petition, whereupon the Commissioner of Internal Revenue filed his answer to same.

In the answer to the amended petition filed by the Commissioner herein, it was admitted by the Commissioner that the deficiency in tax for the fiscal year ended April 30, 1921, was $32,990.18 "if not barred by the Statute of Limitations." [59]

As hereinabove recited, the income of Petitioner herein, to-wit, National Paper Products Company, was reported in a consolidated income and profits tax return filed by Zellerbach Paper Company. Separate sixty day letters were forwarded by the Commissioner of Internal Revenue to Zellerbach Paper Company and National Paper Products Company which resulted in separate appeals to the United States Board of Tax Appeals. In connection with the appeal taken by Zellerbach Paper Company, Board of Tax Appeals Docket Number 39701, a similar amended petition was filed before the Board of Tax Appeals, to which an answer was filed by the Commissioner of Internal Revenue, wherein it was admitted "that the only issue before the Board for decision is whether the deficiency is barred by the Statute of Limitations."

For the purpose of trial before the United States Board of Tax Appeals, the above-captioned case was consolidated with two additional cases, to-wit, Zellerbach Paper Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals Docket Number 39701, and Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals Docket

Number 39704. A joint opinion was rendered by the United States Board of Tax Appeals, and reported in 26 B. T. A. 96. Separate Petitions for Review are being filed, however, in connection with each of these three cases. [60]

The Board of Tax Appeals in its opinion rendered in these cases, recognizes that the identical question has been determined against the Commissioner in three cases, to-wit: Myles Salt Company v. Commissioner (C. C. A. 5th) 49 Fed. (2) 232; Isaac Goldman Company v. David Burnet (Court of Appeals of District of Columbia) 51 Fed. (2) 427, and Valentine-Clark Company v. Commissioner (C. C. A. 8th) 52 Fed. (2) 346. Despite this fact, the Board of Tax Appeals refuses to follow the rulings of the courts.

Board of Tax Appeals Member Van Fossan dissented from the majority of the Board, holding that the cases decided by the courts above cited are controlling. Board of Tax Appeals Member Marquette agreed with this dissent.

IV.

Assignments of Error.

The Petitioner states that in the record and proceedings before the Board of Tax Appeals, and in the decision and the final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred which intervened to the prejudice of the Petitioner and the Petitioner assigns the following errors, and each of them, which,

it avers, occurred in said record, proceedings, decision and final order of redetermination, and upon which it relies to reverse said decision and final order of redetermination so rendered and returned by the Board of Tax Appeals, to-wit: [61]

(a) The Board of Tax Appeals erred in holding that the collection of the deficiency in question was not barred by the Statute of Limitations;

(b) The Board of Tax Appeals erred in holding that the income and profits tax return for the fiscal year ended April 30, 1921, filed by Zellerbach Paper Company, parent corporation of Petitioner herein, and which constituted the return of this Petitioner, on the 16th day of July, 1921, under the provisions of the Revenue Act of 1918, did not start the running of the period of limitation.

(c) The Board of Tax Appeals erred in failing to hold that the return filed on the 16th day of July, 1921, and hereinabove referred to, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921.

(d) The Board of Tax Appeals erred in holding that the Revenue Act of 1921 required the filing of a new income and profits tax return, which would differ from that filed under the Revenue Act of 1918, only by the elimination of a portion of the $2,000 corporate exemption.

(e) The Board of Tax Appeals erred in finding a deficiency against the Petitioner for the fiscal year ending April 30, 1921, in the sum of $32,990.18.

(f) The Board of Tax Appeals erred in rendering a decision for the Respondent. [62]

WHEREFORE, your Petitioner prays:

(1) That this Honorable Court review the decision of the United States Board of Tax Appeals.

(2) That the transcript of the record be prepared in accordance with the law and with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to the Clerk of said court for filing.

(3) That appropriate action be taken by this Honorable Court to the end that the errors complained of may be reviewed and corrected.

(4) For such other and further relief as to this Honorable Court may seem fit and proper.

NATIONAL PAPER PRODUCTS COMPANY,

By THOMAS McLAREN.

JOHN FRANCIS NEYLAN,

J. PAUL MILLER,

Attorneys for Petitioner,

1 Montgomery Street,

San Francisco, California. [63]

State of California,
City and County of San Francisco.—ss.

Thomas McLaren, being first duly sworn, deposes and says:

That he is the Vice-President of National Paper Products Company, the Petitioner in the above entitled matter; and that as such he had authority to, and did sign the above and foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except those matters which are therein alleged on information or belief, and that as to those matters he believes it to be true; that the said petition is filed in good faith, and not for the purpose of delay.

THOMAS McLAREN.

Subscribed and sworn to before me this 1st day of October, 1932.

[Seal] LULU A. GODSIL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1935.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932. [64]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for Respondent.

PLEASE TAKE NOTICE that the above named Petitioner did, on the 4th day of October, 1932, file with the United States Board of Tax Appeals a Petition for Review of the decision of said Board in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which said Petition for Review is herewith served upon you.

(Signed) JOHN FRANCIS NEYLAN,
(Signed) J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

Service of the foregoing Notice and service of a copy of the Petition for Review mentioned in said Notice, is hereby accepted this 4th day of October, 1932.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932 [65]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause came on for hearing before The Honorable E. H. Van Fossan, Member of the United States Board of Tax Appeals, on the 10th day of June, 1931, at Oakland, California, there being present the Petitioner, by its Counsel, Messrs. John Francis Neylan and J. Paul Miller, and the Respondent, by its Counsel, Messrs. H. A. Cox and F. R. Shearer (C. M. Charest, Esq., General Counsel).

Thereupon the following proceedings were had and testimony heard by said Member pertaining to the issues involved in the petition for Review filed with the United States Board of Tax Appeals on the 9th day of July, 1928.

Prior to the introduction of testimony, Counsel for petitioner moved for the consolidation of the above-entitled case for the purpose of the hearing with the two additional cases, to-wit, Zellerbach Paper Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals Docket No. 39701, and Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals No. 39704, which motion was granted. [66]

Thereupon attention was called to the desirability of correcting a certain stipulation which had theretofore been filed in case Docket No. 39704 hereinabove referred to, whereupon the following proceedings took place:—

"Mr. Neylan: Mr. Cox has the language which has been agreed upon.

"Mr. Cox: At the middle of page 2 of that stipulation, the following language or the following sentence is to be stricken out:

'A. S. Hopkins Company filed its return on March 15, 1921, for the calendar year 1920, and included in said return its income for the months of November and December, 1920.'

In lieu of that sentence there is to be substituted the following sentence:

'On March 15, 1921, Zellerbach Paper Company, designated itself, Zellerbach Paper Company, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920.'

Then in the next sentence on the same page an insertion is to be made whereby that sentence, as corrected, will read:

'The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent).'

And then continue with the rest of the sentence just as it now stands in the stipulation without

further change, the only change being that after the word 'included' in that sentence there is to be inserted the words 'as part of the income of Zellerbach Paper Company'.

"The Member: That is in Docket number 39704.

"Mr. Cox: Yes." [67]

Thereupon Petitioner's Counsel offered in evidence the original Income and Profits Tax Return of the Zellerbach Paper Company, the National Paper Products Company, and the Sanitary Products Corporation for the period May 1st, 1920 to the period ended April 30, 1921. In connection with the offer, the following colloquy occurred:

"Mr. Neylan: Now, in relation to the original return in this matter, I assume it is necessary to introduce that in evidence?

"The Member: We have it before us.

"Mr. Neylan: May I ask counsel for the Government if he will agree, without formal proof, that this return which has been handed to me by counsel for the Government is the original return of the Zellerbach Paper Company, the National Paper Products Company, the Sanitary Products Corporation for the period May 1st, 1920, to the period ended April 1st, 1921, and may this be introduced without objection?

"Mr. Cox: May we ask if the signers of the return were officers of all the companies you have named?

"Mr. Neylan: I will have to verify that, Mr. Cox. Mr. Zellerbach, I may say positively, was certainly an officer of the Zellerbach Paper Company, and of National Paper Products.

"The Member: Was he also an officer of Sanitary Products Corporation?

"Mr. Neylan: This is a consolidated return, your Honor.

"Mr. Cox: We agree that this is the original return for whatever it purports to be.

"Mr. Neylan: That is all I want."

The document was received in evidence and marked "Petitioner's Exhibit No. 1." Thereupon Mr. Neylan, counsel for Petitioner, stated: "This is the only return in relation to this matter that this corporation or these corporations ever filed." [68]

Thereupon the following proceedings took place:—

"Mr. Neylan: Your Honor, I would like to ask at this time if the sixty-day letters in each of these matters which are appended to the petition are considered in evidence and as a part of the record, or is it necessary to introduce them in evidence?

"Mr. Cox: We admitted them to be correct in our answer, did we not?

"Mr. Neylan: I think you did.

* * * * * * *

"Mr. Neylan: As I understand, Government counsel at this time agrees that they may be considered in evidence as the correct sixty-day letters, is that correct, Mr. Cox?

"Mr. Cox: Yes, assuming we admitted them.

"Mr. Neylan: Well, subject to that.

"The Member: If you did not admit them, are you now admitting them?

"Mr. Cox: If your Honor will give me a minute I will see whether we did or not. There was a question as to one of them.

"Mr. Neylan: That was in relation to 1925, Mr. Cox?

"Mr. Cox: Yes, they are all three admitted in the answer.

"The Member: Very well."

Thereupon Counsel for Petitioner made his opening statement, and offered some evidence which was received by the Board, after which Counsel for the Respondent offered in evidence the income and profits tax return of the A. S. Hopkins Company which had been filed by Zellerbach Paper Company as successor to A. S. Hopkins Company, and is the return referred to in the Stipulation entered into between the parties in Docket No. 39704, which return was received in evidence [69] and marked "Respondent's Exhibit A."

Thereupon the following proceedings took place:—

"Mr. Cox: The position of the respondent in this case is that an additional return was necessary under the law and under the regulations of Commissioner which were authorized by law; and it is also our position that the return filed did not segregate the income of all the companies; in other words, the income of the Hop-

kins Company was not segregated from the income of the Zellerbach Company, but they were both included as the income of the Zellerbach Company, and the Board in several cases, as I understand, has sustained the position of the Commissioner on this case.

"The Member: How does this case differ from the Myles Salt case?

"Mr. Cox: This differs from the Myles Salt case in the matter that I have just pointed out, and there are probably other matters. We wish, for the purpose of the brief, to analyze the return, and call your Honor's attention to such things as we think mark the distinction between the two cases; but there is that one distinction which I have in mind, that the income of the two companies was not segregated, and under the decision of the Circuit Court of Appeals, for the Fifth Circuit, in Robert H. Lucas, Commissioner, v. Colmer Green Lumber Company, decided April 30, 1931, that was made the basis, as I understand it, of that decision.

"The Member: In that case, as I recall, they held there was not a substantial revelation of the facts necessary to determine the income of each of the corporations.

"Mr. Cox: Yes, of each separate company.

"The Member: And, it therefore, did not comply with their understanding of the statute. It was the same circuit that had the Myles Salt case, was it not?

"Mr. Cox: That was the same Circuit, yes.

"The Member: Is there anything else you wish to submit?

"Mr. Cox: Nothing your Honor." [70]

Thereupon the Petitioner introduced the following testimony in rebuttal:

TESTIMONY OF ALONZO WALLACE HELVERN

Alonzo Wallace Helvern being first duly sworn, on direct examination in substance testified as follows:

My name is Alonzo Wallace Helvern; I reside in San Francisco; my profession is that of a public accountant and tax advisor. I have been a public accountant for ten years; I am now and for a number of years past have been familiar with tax matters; I have been associated with the accounting firm of Lybrand, Ross Bros. & Montgomery for a period of ten years; I am the manager of the Tax Department of this firm at the present time and have been since January 1, 1928. I have had occasion to examine the original books and records of account of the Zellerbach Paper Company, National Paper Products Company, and the A. S. Hopkins Company, and I am familiar with the income tax returns of these companies. I heard the point made by Counsel for the Government, Mr. Cox, in connection with the segregation of the income of the A. S. Hopkins Company. I am familiar with the facts in relation to the income of the A. S. Hopkins Company and with the accounting records of Zellerbach

(Testimony of Alonzo Wallace Helvern.)

Paper Company in relation thereto. My information in relation thereto was gathered in the following manner:

Prior to 1925 I was engaged in auditing rather than income tax work, although income tax work was a part of my duties. I was at that time employed by Lybrand, Ross Bros. & Montgomery and had been engaged by them since January, 1921. Part of my work was the auditing of the accounts of Zellerbach Paper Company. [71] In the ordinary course of my duties as an accountant and as an employee of Lybrand, Ross Bros. & Montgomery I came in contact with the accounts of Zellerbach Paper Company; I was engaged as a senior auditor in the auditing of those accounts.

In relation to the income of A. S. Hopkins Company, beginning with October, 1920, I found that all of the capital stock of the A. S. Hopkins Company, or approximately all of that capital stock was acquired by Zellerbach Paper Company during the month of October, 1920. I found that Zellerbach Paper Company continued the A. S. Hopkins Company as a subsidiary maintaining its own set of books and records until December 31, 1920. Thereafter, the A. S. Hopkins Company fully controlled by Zellerbach Paper Company, was continued up to the time of its dissolution as a mere branch of Zellerbach Paper Company and had no separate set of books, its operations being mingled and operated entirely by Zellerbach Paper Company as its own branch. It had no set of books after January 1,

(Testimony of Alonzo Wallace Helvern.)

1921. There was no segregation of the income or of the expense of the conducting of the A. S. Hopkins Company; such segregation would have been very impractical, and probably impossible. It was merely a part of Zellerbach Paper Company for accounting purposes.

Thereupon the witness was cross-examined by Government Counsel as follows:

"By Mr. Shearer:

"Q. Now, in regard to the income of the Hopkins Company beginning January 1, 1921, up to the end of the fiscal year that is involved in this case, it is true, is it not, that the Commissioner did determine a substantial income between those periods, January 1, 1921, [72] and the end of this fiscal year, for the Hopkins Company?

"A. If the Commissioner did make such determination, it was not known to me from my subsequent examination of the Revenue Agent's reports and records. There is no indication that any segregation was made by the Commissioner, from any knowledge I have after January 1st.

"Mr. Neylan: Here is one letter, November 1, 1920 to April 30th, 1921—is that what you are looking for?

"Mr. Shearer: Yes.

"Mr. Neylan: That includes the months of November and December, 1920, when it had a separate set of books. You will find that in the

(Testimony of Alonzo Wallace Helvern.)

deficiency letter. I might say to counsel for the Government that the original thirty-day letter of the Commissioner, dated the 27th day of December, 1927, made no segregation to the Hopkins Company.

"Mr. Shearer: Counsel for Petitioner is correct in his statement. I was laboring under a misapprehension. The income set up in the deficiency letter of May 11, 1928, a copy of which is attached to the original petition in Docket No. 39701 shows that the income for the period ended April 30th, as a matter of fact, was two months' income for November and December, 1920.

"No further cross-examination."

The foregoing is the substance of the evidence adduced at the trial of this proceeding pertaining to the issues involved in this appeal.

JOHN FRANCIS NEYLAN.
WCM.

J. PAUL MILLER.
WCM. [73]

I have no objection to the foregoing statement of the evidence.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Settled and approved this 23rd day of May, 1933.

(Sgd) J. E. MURDOCK,
Member, U. S. Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Lodged May 19, 1933.

[Endorsed]: United States Board of Tax Appeals. Filed May 23, 1933. [74]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the Petition for Review in the above stated case, transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit certified copies of the following documents:

1. The docket entries of all proceedings before the Board of Tax Appeals in the above entitled cause;

2. The Petition of the taxpayer, together with deficiency letter dated May 11, 1928, attached to which is "Statement of Returns Examined and Resulting Tax Liability;" also copy of deficiency letter dated May 11, 1928 to Zellerbach Paper Company, parent corporation of Petitioner, which letter, addressed to Zellerbach Paper Company, was referred to in deficiency letter addressed to Petitioner. [75]

3. Answer of Commissioner of Internal Revenue;

4. Stipulation between attorneys for respective parties filed with the Board of Tax Appeals on or about February 10th, 1931;

5. Motion to file Amended Petition and Amended Petition;

6. Commissioner's Answer to Amended Petition;

7. Findings of Fact and Opinion of the Board, including Dissenting Opinion;

8. Motion of Counsel for Respondent to find deficiency in sum of $32,990.18;

9. Notice under Rule 50;

10. Decision of the Board;

11. Petition for Review to the Circuit Court of Appeals for the Ninth Circuit;

12. Notice of Filing of Petition for Review;

13. Petitioner's Exhibit number one, being Income and Profits Tax Return for period ended April 30th, 1921, filed by Zellerbach Paper Company, parent of Petitioner, on behalf of the said Zellerbach Paper Company, this Petitioner, and Sanitary Products Corporation;

14. Respondent's Exhibit "A", being Income and Profits Tax Return filed by Zellerbach Paper Company, as successor to [76] A. S. Hopkins Company for the calendar year 1920;

15. Statement of Evidence;

16. This Praecipe;

the foregoing to be prepared, certified, and transmitted as required by law and the rules of the Circuit Court of Appeals for the Ninth Circuit.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 31, 1932. [77]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 77, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of June, 1933.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7211. United States Circuit Court of Appeals for the Ninth Circuit. National Paper Products Company, a Corporation, Petitioner, vs. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 3, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7211

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL PAPER PRODUCTS COMPANY, a Corporation,
Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.

No. 7211

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit

ZELLERBACH PAPER COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39701
NATIONAL PAPER PRODUCTS COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39715
ZELLERBACH PAPER COMPANY, as transferee of A. S. Hopkins Company, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39704

STIPULATION AND ORDER FOR CONSOLIDATION ON APPEAL.

Whereas, the three above-named cases, upon motion of John Francis Neylan, Counsel for Petitioners,

and consented to by Counsel for Respondent, were consolidated by order of the United States Board of Tax Appeals for trial; and

Whereas, after said trial by the United States Board of Tax Appeals of said consolidated cases, a joint opinion applying to said three cases was rendered by said Board; and

Whereas, petitions for the review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit have been filed by the Petitioners with the Clerk of the United States Board of Tax Appeals, and the appeals perfected; and

Whereas, the same point of law is involved in each of said three cases, to-wit: is the collection from the Petitioners of the additional tax claimed by the Respondent for the fiscal year ending April 30th, 1921, barred by the Statute of Limitations; and

Whereas, it is the opinion of the respective Counsel for the parties to the said three cases that it would most suit their convenience in the handling of the said cases on appeal, and would also be of great assistance to the said United States Circuit Court of Appeals in its determination of said cases, if said cases should be consolidated for purposes of appeal;

It is hereby stipulated by and between John Francis Neylan and J. Paul Miller, Counsel for each of the Petitioners in the above-entitled cases, and C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for the Respondents in each of said cases,

1. That said cases may be consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of oral argument before said Court;

2. That but a single printed transcript of record on appeal be prepared by and printed under the direction of the Clerk of said Court, said Clerk to avoid including in said printed transcript more than one copy of such matters and documents as are duplicated in the certified transcripts of record sent up to him by the Clerk of the United States Board of Tax Appeals;

3. That on all occasions, when pursuant to law or rule of court, the parties to said cases are privileged to file briefs, a single brief, rather than three, may be filed, wherein all matters involved in all of said cases may be discussed and argued;

4. That the said three cases may be heard by the United States Circuit Court of Appeals for the Ninth Circuit upon one oral argument before said Court.

Dated: San Francisco, California, February 1st, 1933.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondents.

It is hereby ordered, that pursuant to the foregoing stipulation, the three above-named cases be

and they are hereby consolidated in accordance with the terms of said stipulation.

Dated: San Francisco, California, March 10, 1933.

CURTIS D. WILBUR,
United States Circuit Judge.

Now, June 20, 1933, the foregoing Stipulation and Order certified from the record as a true copy.

.....

Clerk Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Received Mar. 14, 1933.

[Endorsed]: Filed Jul. 3, 1933. Paul P. O'Brien, Clerk.

[CLERK'S NOTE.]

Pursuant to stipulation of counsel for respective parties, and order of the court thereon, this case was consolidated with its companion case, No. 7209 entitled Zellerbach Paper Company, a corporation, petitioner, against Guy T. Helvering, as Comm'r of Int. Revenue, respondent, for briefing, argument and decision. Accordingly, all proceedings in the Circuit Court of Appeals for the Ninth Circuit in this case will be found at pages 122 to 144, inclusive, of the record in its companion case, and such proceedings, being similar, are not reprinted here in the interest of economy.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7211

NATIONAL PAPER PRODUCTS COMPANY, a Corporation,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Feb. 28, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-four pages, numbered from and including 1 to and including 94 to be a full, true and correct copy of the record as filed in this cause in the said Circuit Court of Appeals, together with stipulation and order consolidating this cause with its companion cause for briefing, argument and decision, and judgment filed and entered herein; and that all proceedings in this cause in this court were had jointly with its companion case, and that the proceedings as set forth as part of the record in that case covers these companion cases, and that this record together with the proceedings is a full, true and correct copy of the entire record of the above entitled cause in said Circuit Court of Appeals, excluding original exhibits transmitted herewith, made pursuant to request of counsel for petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, this 28th day of March, 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 97] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

4

In the Supreme Court

OF THE

United States

MAY 10 1934
CHARLES ELMORE CROPLEY

OCTOBER TERM, 1933

Nos.

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner*, vs. GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent*.	37 No. ~~1030~~
ZELLERBACH PAPER COMPANY (a corporation), as Transferee of A. S. Hopkins Company, *Petitioner*, vs. GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent*.	38 No. ~~1040~~
NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner*, vs. GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent*.	39 No. ~~1041~~

PETITION FOR WRITS OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

Nos.

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

ZELLERBACH PAPER COMPANY (a corporation), as Transferee of A. S. Hopkins Company, *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

PETITION FOR WRITS OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petition of Zellerbach Paper Company, a corporation, Zellerbach Paper Company, a corporation, as Transferee of A. S. Hopkins Company, and National Paper Products Company, a corporation, for Writs of Certiorari, directed to the Circuit Court of Appeals for the Ninth Circuit, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The controversy herein arises out of additional income and profits taxes claimed by the Commissioner of Internal Revenue from Zellerbach Paper Company, A. S. Hopkins Company (Zellerbach Paper Company, transferee) and National Paper Products Company for the fiscal year ended April 30, 1921.

The three cases, hereinabove noted, were jointly tried before the United States Board of Tax Appeals, and a joint decision against the taxpayers was rendered therein (R. 81, 89, 119).*

Petitions to review the several orders of the Board of Tax Appeals were filed with the Circuit Court of Appeals for the Ninth Circuit. Here also, the three cases were jointly briefed and argued; a joint opinion was rendered (R. 125) but a separate judgment was rendered in each case, affirming the orders of the Board of Tax Appeals.

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*This is a joint Petition by the three Petitioners hereinabove named. All references are to the record in Zellerbach Paper Company v. Commissioner of Internal Revenue, C. C. A. No. 7209, unless otherwise noted.

On July 16, 1921, Zellerbach Paper Company, one of the Petitioners herein, filed a consolidated Income and Profits Tax Return for the fiscal year ended April 30, 1921, with the Collector of Internal Revenue at San Francisco, California, on behalf of itself and its wholly owned subsidiaries, National Paper Products Company (one of the Petitioners herein) and Sanitary Products Corporation, the latter corporation having been operated at a loss. There was included in this return, the income of the A. S. Hopkins Company for the four months period January 1, 1921 to April 30, 1921. Actually, the latter corporation was not affiliated with the Zellerbach Paper Company during the four months period ending April 30, 1921, but was conducted as a mere branch of the parent, and without separate accounting records (R. 111). The small deficiency asserted against the A. S. Hopkins Company (Zellerbach Paper Company, transferee) is on income earned by the A. S. Hopkins Company for the months of November and December, 1920 (R. 112, 113). These minor matters are unimportant, however, and do not have any bearing on the principal question, to-wit, whether the filing of the consolidated return on July 16, 1921, for the fiscal year ended April 30, 1921, set in motion the Statute of Limitations beyond which period the Commissioner could not initiate proceedings to collect additional taxes (see Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 250 (d) thereof; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 250 (d) thereof).

No additional return for the fiscal year ended April 30, 1921, was filed by Zellerbach Paper Company,

National Paper Products Company, Sanitary Products Corporation, or A. S. Hopkins Company (R. 86).

At the time the consolidated return hereinabove referred to was filed, to-wit, on July 16, 1921, the Revenue Act of 1918, c. 18, 40 Stat. 1057, was in effect. Under the provisions of this Act (Section 250 (d) thereof) the time within which the Commissioner could assess additional taxes for the fiscal year in question, in the absence of fraud, was five years after the return was filed. This period was reduced to four years by Section 250 (d) of the 1921 Revenue Act, c. 136, 42 Stat. 227. No fraud was asserted by the Commissioner.

It is obvious, therefore, that ordinarily the four year period within which the Commissioner could institute proceedings to collect additional taxes would have expired July 16, 1925. On February 27, 1925 (prior to the expiration of the four year period) the Zellerbach Paper Company and National Paper Products Company acting on the request of the Commissioner of Internal Revenue, each executed a waiver extending the time within which the Commissioner could assess additional taxes for the fiscal year ended April 30, 1921, to December 31, 1925 (R. 79). No additional waivers were executed, as a result of which, the Petitioners herein contend, the time within which the Commissioner could assess additional taxes expired on December 31, 1925.

At the time of filing the consolidated return by the Zellerbach Paper Company on July 16, 1921, the Revenue Act of 1918, c. 18, 40 Stat. 1057 (Section

236 (c)) provided for a corporate exemption of $2000; where a consolidated return was filed on behalf of affiliated corporations, but one exemption was allowed (Section 240 (a)).

The 1921 Revenue Act, c. 136, 42 Stat. 227, adopted November 23, 1921, eliminated this $2000 exemption where the net income of the corporation (or affiliated corporations) exceeded $25,000 (Sec. 236 (b)). This provision of the 1921 Revenue Act was retroactive to January 1, 1921 (Section 1400 (a)). The net income of the affiliated corporations herein exceeded $25,000, for the period ended April 30, 1921.

The retroactive operation of the 1921 Act as of January 1, 1921, thus had the effect of eliminating one-third of the $2000 exemption claimed by Zellerbach Paper Company and its subsidiaries in their consolidated return filed July 16, 1921, for the fiscal year ending April 30, 1921, i. e., the sum of $666.67, resulting in additional taxes in the sum of $66.67. There were no changes in the 1921 Revenue Act bringing about an increase of the tax due from these taxpayers, other than the elimination of the $2000 exemption as aforesaid.

Under date of May 11, 1928, the Commissioner of Internal Revenue issued, under the provisions of Section 274 of the Revenue Act of 1926, c. 27, 44 Stat. 9, so-called deficiency letters to Zellerbach Paper Company (R. 22); to Zellerbach Paper Company, as Transferee of A. S. Hopkins Company (R.—C. C. A. No. 7210, p. 21); and to National Paper Products Company (R.—C. C. A. No. 7211, p. 22).

The parties stipulated the amounts claimed are due unless barred by the Statute of Limitations (R. 82, 83, 84).

The Petitioners claim the right of the Respondent to assess, and collect additional taxes from them, is barred by the provisions of Section 250 (d) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, which provisions were carried forward in subsequent Revenue Acts.

Petitioners further claim that the consolidated return filed July 16, 1921, became the return required under the Revenue Act of 1921, adopted November 23, 1921, and which was retroactive in part to January 1, 1921.

The Respondent claims no returns were filed on behalf of the Zellerbach Paper Company or National Paper Products Company for the fiscal year ended April 30, 1921, under the Revenue Act of 1921, and as a result no Statute of Limitations applies (R. 26; R.—C. C. A. No. 7210, p. 27; R.—C. C. A. No. 7211, p. 27).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

(1) The Circuit Court of Appeals for the Ninth Circuit, has held in the instant cases that an Income and Profits Tax Return filed on July 16, 1921, and in strict conformity with the Revenue Act of 1918 in

effect at that time, did not become a return under the Revenue Act of 1921, adopted in November, 1921, despite the fact that said Act was made retroactive as to the pertinent portions thereof, as of January 1, 1921 (R. 125). As a result of this holding, the Court concluded that the Statute of Limitations did not begin to run on the date the return was filed, to-wit, July 16, 1921, and held the Commissioner's deficiency letters were timely although not issued until May 11, 1928, nearly seven years after the filing of the return.

The decision of the Circuit Court of Appeals for the Ninth Circuit on the above questions is in direct conflict with decisions on the same questions by the Circuit Court of Appeals for the Fifth Circuit in *Myles Salt Company v. Commissioner* (1931), 49 Fed. (2d) 232, and by the Circuit Court of Appeals for the Eighth Circuit in *Valentine-Clark Company v. Commissioner* (1931), 52 Fed. (2d) 346; and by the Court of Appeals of the District of Columbia in *Isaac Goldmann Company v. Burnet* (1931), 51 Fed. (2d) 427.

The majority opinion of the United States Board of Tax Appeals in the instant cases, recognized the applicability of the three cases hereinabove referred to, but refused to follow them (R. 89).

The dissenting opinion of the Board of Tax Appeals also recognized the applicability of the above cases and stated they should be followed (R. 90).

The opinion by the Circuit Court of Appeals for the Ninth Circuit in the instant cases, also recognized the

questions involved in the three cases above referred to were the same as here (R. 127). In fact, the Circuit Court of Appeals stated in its opinion in the companion cases in which a separate Petition is being filed for Writs of Certiorari as follows:

> "We wish to make it clear that unless we are correct in holding that the decisions of our coordinate courts are erroneous this case as well as the companion case should be reversed."

(See *National Paper Products Company, a Corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent,* C. C. A. 9, No. 7140, p. 94, at 111, in which case a Petition for Writ of Certiorari is being concurrently filed herein.)

(2) An additional reason why the Writs of Certiorari should be granted is that an important question of Federal law has been decided by Circuit Courts of Appeals, for three different circuits, and by the Court of Appeals of the District of Columbia, and has not been, but should be, settled by this Court.

Wherefore, your Petitioners respectfully pray that Writs of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, full and complete transcripts of the records and proceedings in the cases numbered and entitled on its docket, No. 7209, Zellerbach Paper Company, a corporation, Petitioner, v. Guy T. Helvering as Commissioner of Internal Revenue, Respondent; No. 7210,

Zellerbach Paper Company, a corporation, as Transferee of A. S. Hopkins Company, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent; No. 7211, National Paper Products Company, a corporation, Petitioner v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, and that the said judgments and each of them of the said Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

Dated, San Francisco, California,
May 4, 1934.

ZELLERBACH PAPER COMPANY,
ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company,
NATIONAL PAPER PRODUCTS COMPANY,
By JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Counsel for Petitioners.

In the Supreme Court

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Nos.

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner,*

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NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner,*

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

As heretofore pointed out (in the Petition for Writs of Certiorari), the Circuit Court of Appeals for the Ninth Circuit rendered a joint opinion in the three cases herein on February 28, 1934. This opinion has not been reported. It is printed in the Record, beginning at page 125.

A joint opinion (and a joint dissenting opinion) were also rendered by the United States Board of Tax Appeals, and reported in 26 B. T. A. 96.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under subdivisions (a) and (c) of Section 240, amended, of the Judicial Code (U. S. C. A. title 28, Sec. 347; Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

2. Although a joint opinion was rendered, separate judgments were filed in the several cases. See Zellerbach Paper Company v. Helvering, C. C. A. No. 7209 at page 142; Zellerbach Paper Company as Transferee of A. S. Hopkins Company v. Helvering, C. C. A. No. 7210 at page 94; National Paper Products Company v. Helvering, C. C. A. No. 7211, at page 94.

3. As heretofore pointed out in our Petition for Writs of Certiorari and under the heading, Reasons

Relied on for the Allowance of the Writs (see page 6 supra), there is a clear conflict between the decisions of the Circuit Court of Appeals for the Ninth Circuit in the instant case and other Courts of coordinate jurisdiction. Supreme Court Rule No. 38, subdivision 5 (b) provides for the granting of a Petition for Certiorari within the discretion of this Court, where such conflict exists.

4. In the following cases Petitions for Writs of Certiorari were granted where a conflict between different Circuit Courts of Appeals existed:

Magnum Import Co. v. Coty (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. Ed. 922, 924;

Sanitary Refrigerator Co. v. Winters (1928), 278 U. S. 587; 49 Sup. Ct. Rep. 17; 73 L. Ed. 521; and see

Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 34; 50 Sup. Ct. Rep. 9, 10; 74 L. Ed. 147, 152.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "A" in the Petition (pages 2 to 6 inclusive), and in the interest of brevity, the statement is not repeated at this point.

IV.

SPECIFICATION OF ERRORS.

A. The Court erred in finding and holding that the collection of the deficiencies in question was not barred by the Statute of Limitations. Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 250 (d) thereof; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 250 (d) thereof.

B. The Court erred in finding and holding that the Income and Profits Tax Return for the fiscal year ended April 30, 1921, filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, and in strict conformity with the Revenue Act of 1918, did not set the Statute of Limitations in motion.

C. The Court erred in finding and holding that the Consolidated Income and Profits Tax Return filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921, which Act was retroactive as to the pertinent portions thereof as of January 1, 1921.

D. The Court erred in finding and holding that the Revenue Act of 1921 required the filing of a new Income and Profits Tax Return, which would differ from the return theretofore filed under the Revenue Act of 1918, only by the elimination of a portion of the $2000 exemption.

E. The Court erred in affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company v. Helvering, C. C. A. 9, No. 7209,

which Order found that a deficiency was due from the said Zellerbach Paper Company in the sum of $69,114.02 (R. 94, 142).

F. The Court erred in affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company as Transferee of A. S. Hopkins Company, v. Helvering, C. C. A. 9, No. 7210, which Order found that a deficiency was due from the said Zellerbach Paper Company, as transferee of A. S. Hopkins Company, in the sum of $1744.37 (R. 61, 94).

G. The Court erred in affirming the Order of the United States Board of Tax Appeals in National Paper Products Company v. Helvering, C. C. A. 9, No. 7211, which Order found that a deficiency was due from the said National Paper Products Company in the sum of $32,990.18 (R. 63, 94).

V.

ARGUMENT.

POINT A. THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION CLEARLY IN CONFLICT WITH DECISIONS BY COURTS OF COORDINATE JURISDICTION.

We respectfully refer the Court to our Petition for Writs of Certiorari, heading "B"—Reasons Relied on for the Allowance of the Writs (pages 6 to 9). Here we have set forth the questions decided by the Circuit Court of Appeals for the Ninth Circuit, in the instant cases, and have shown the identical questions have been passed upon by the Circuit Courts of Appeals for the Fifth and Eighth Circuits, and by the Court of

Appeals of the District of Columbia, and that a clear conflict exists between these several Courts of co-ordinate jurisdiction. The cases decided contra to the decisions in the instant cases are: *Myles Salt Company v. Commissioner* (1931), 49 Fed. (2d) 232; *Valentine-Clark Company v. Commissioner* (1931), 52 Fed. (2d) 346; and *Isaac Goldmann Company v. Burnet* (1931), 51 Fed. (2d) 427.

The fact that a clear conflict exists is recognized by the United States Board of Tax Appeals in the prevailing opinion (R. 89) and in the dissenting opinion (R. 90) and by the Circuit Court of Appeals for the Ninth Circuit in its own opinion herein (R. 127) and also in the companion cases, where a separate Petition for Writs of Certiorari is being filed (see National Paper Products Company, a corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, C. C. A. 9, No. 7140, pp. 94, 111, being docketed concurrently with the instant cases).

We rely upon Supreme Court Rule 38, subdivision 5 (b) and on the following cases:

Magnum Import Co. v. Coty (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. Ed. 922, 924;

Sanitary Refrigerator Co. v. Winters (1928), 278 U. S. 587; 49 Sup. Ct. Rep. 17; 73 L. Ed. 521; and see

Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 34; 50 Sup. Ct. Rep. 9, 10; 74 L. Ed. 147, 152.

POINT B. AN IMPORTANT QUESTION OF FEDERAL LAW HAS BEEN DECIDED BY THREE CIRCUIT COURTS OF APPEALS, AND BY THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

Two Circuit Courts of Appeals (the 5th and the 8th) and the Court of Appeals of the District of Columbia have held:

(a) That an Income and Profits Tax Return filed in strict conformity with the Revenue Act of 1918 became the return required under the Revenue Act of 1921, upon the adoption of that Act, which was retroactive in part to January 1, 1921, where no changes in the return were necessary except a new computation occasioned by the elimination of a portion of the corporate exemption allowed by the Revenue Act of 1918; and

(b) That the Statute of Limitations (five years under Section 250 (d) of the 1918 Act and four years under Section 250 (d) of the 1921 Act) was set in motion upon the filing of an Income and Profits Tax Return under the conditions as set forth in subdivision (a), supra.

The Circuit Court of Appeals for the Ninth Circuit, in considering the above questions, has reached exactly the opposite results.

These questions are of great importance not only to the taxpayers, but to the Government itself.

We respectfully submit the conflict should be eliminated and a conformity of decision should be established (see *Magnum Import Co. v. Coty* (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. Ed. 922, 924).

VI.

CONCLUSION.

It is, therefore, respectfully submitted that these cases call for the exercise by this Court of its supervisory powers in order that the decisions of the Circuit Court of Appeals for the Ninth Circuit should be made to conform to decisions of Courts of co-ordinate jurisdiction, and that to such an end Writs of Certiorari should be granted and this Court should review the decisions of the Circuit Court of Appeals for the Ninth Circuit and finally reverse them.

Dated, San Francisco, California,
May 4, 1934.

ZELLERBACH PAPER COMPANY,
ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company,
NATIONAL PAPER PRODUCTS COMPANY,
By JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Counsel for Petitioners.

(Appendix Follows.)

Appendix

PERTINENT PARTS OF THE REVENUE ACT OF 1918, c. 18, 40 STAT. 1057.

Sec. 239: That every corporation subject to taxation under this Title * * * shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title. * * *

Sec. 241 (a): That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227.

Sec. 227(a): That returns shall be made on or before the 15th day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year then the return shall be made on or before the 15th day of March. * * *

Sec. 240 (a): That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this Title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return. * * * There shall be allowed in computing the income tax only one specific credit of $2,000 (as provided in section 236); * * *

Sec. 236: That for the purpose only of the tax imposed by Sec. 230 there shall be allowed the following credits:

* * * * * * *

Sec. 236 (c): In case of a domestic corporation, $2000.

Sec. 250 (d): Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

PERTINENT PARTS OF THE REVENUE ACT OF 1921, c. 136, 42 STAT. 227.

Sec. 239 (a): That every corporation subject to taxation under this Title * * * shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title. * * *

Sec. 241(a): That returns of corporations shall be made at the same time as is provided in subdivision (a) of Sec. 227. * * *

Sec. 227 (a): That returns * * * shall be made on or before the 15th day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March. * * *

Sec. 236: That for the purpose only of the tax imposed by Section 230 there shall be allowed the following credits:

* * * * * * *

Sec. 236 (b): In the case of a domestic corporation the net income of which is $25,000 or less, a specific credit of $2000; but if the net income is more than $25,000 the tax imposed by section 230 shall not exceed the tax which would be payable if the $2000 credit were allowed, plus the amount of the net income in excess of $25,000.

Sec. 250 (d): The amount of income, excess profits, or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax, and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax acts, * * * shall be begun after the expiration of five years after the date when such return was filed, * * *.

Sec. 1400 (a): That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b): Title II (called "Income Tax") as of January 1, 1921; Title III (called "War Profits and Excess-Profits Tax") as of January 1, 1921.

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In the Supreme Court

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United States

OCTOBER TERM, 1934

Nos. 37-39

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner,*

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GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

BRIEF FOR PETITIONERS.

On Writs of Certiorari to the United States Circuit Court of Appeals For the Ninth Circuit.

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(5) The 1921 Act provides a statutory period of four years after the filing of a return, within which an additional assessment might be made or a sixty-day letter issued; this time was extended by waivers to

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(6) The Commissioner of Internal Revenue, respondent herein, has confessed error (or failed to prosecute) in several cases involving the exact point involved here, after decisions by the Board of Tax Appeals against taxpayers, and after appeals by these taxpayers to the courts 28

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1934

Nos. 37-39

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

BRIEF FOR PETITIONERS.

On Writs of Certiorari to the United States Circuit Court of Appeals For the Ninth Circuit.

OPINIONS BELOW.

This proceeding comes before this Court on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review judgments of that Court in the three cases above noted.

The several judgments are to be found in No. 37, R. 142; No. 38, R. 94; No. 39, R. 94.

A joint opinion, affirming the decisions of the United States Board of Tax Appeals was rendered by the Circuit Court of Appeals and reported in 69 Fed. (2d) 852. It is printed in No. 37, R. 125.

A joint opinion was rendered by the Board of Tax Appeals and is found in 26 B. T. A. 96. It is printed in No. 37, R. 81. A dissenting opinion was also filed (No. 37, R. 90).

The Board of Tax Appeals' decisions in favor of the Commissioner of Internal Revenue, Respondent herein, and against the taxpayers, Petitioners herein, in the three cases, are to be found in No. 37, R. 94; No. 38, R. 61; No. 39, R. 63.

JURISDICTION.

The judgments of the Circuit Court of Appeals in the several cases were entered on February 28, 1934 (No. 37, R. 142; No. 38, R. 94; No. 39, R. 94).

A single petition for a writ of certiorari in each case was filed May 10, 1934, and the writs were granted on June 4, 1934 (No. 37, R. 146; No. 38, R. 97; No. 39, R. 97).

Jurisdiction of this Court rests on subdivisions (a) and (c) of Section 240, amended, of the Judicial Code (U. S. C. A. title 28, Sec. 347; Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

STATEMENT OF THE CASE.

This is a joint brief in support of the Petitioners in the three cases involved.

On July 16, 1921, Zellerbach Paper Company, a corporation, on behalf of itself and its corporate subsidiaries, National Paper Products Company and Sanitary Products Corporation, filed a Consolidated Income and Profits Tax Return *for the fiscal year ended April 30, 1921,* with the Collector of Internal Revenue at San Francisco, California (No. 37, R. 86). This original return is before this Court for its inspection.

Previously thereto, to-wit, on March 15, 1921, the Zellerbach Paper Company, *as successor of the A. S. Hopkins Company,* had filed an Income and Profits Tax Return on behalf of the Hopkins Company *for the calendar year 1920* with the Collector at San Francisco (No. 37, R. 85, 86). This original return is also before the Court for its inspection.

The income of the A. S. Hopkins Company *after December 31, 1920,* was included in the consolidated return of the Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, and filed on July 16, 1921, as above noted.

This was because the Hopkins Company kept no separate books of account after December 31, 1920, its operations being mingled with Zellerbach Paper Company as if it were a branch of the latter company (No. 37, R. 87). There was no segregation of income or expense of the Hopkins Company after December 31, 1920, and it was testified such segregation would probably have been impossible (No. 37, R. 111).

All of the outstanding stock of the A. S. Hopkins Company (a corporation) was purchased by Zellerbach Paper Company in October of 1920, and the Hopkins Company thereupon became an affiliate of the purchasing corporation. As a result thereof, the Commissioner of Internal Revenue thereafter asserted that the income of the A. S. Hopkins Company for the months of November and December, 1920, should have been included in the consolidated return of the Zellerbach Paper Company and its two additional subsidiaries above named, which return was filed July 16, 1921.

The deficiency claimed by the Commissioner of Internal Revenue against Zellerbach Paper Company *as successor of A. S. Hopkins Company* (this is case numbered 38) is based upon the income of the A. S. Hopkins Company for the months of November and December, 1920, which income was ascribed by the Commissioner to the consolidation, although it had been separately reported by the Zellerbach Paper Company in the return filed March 15, 1921, and a tax paid thereon.

From a practical standpoint the action of the Commissioner of Internal Revenue consisted in eliminat-

ing the income of the Hopkins Company for the months of November and December, 1920, from the return filed on behalf of the Hopkins Company on March 15, 1921, and adding it to the consolidated income of the Zellerbach Paper Company and its affiliates for the fiscal year ended April 30, 1921. In transferring this income of the Hopkins Company to the consolidation the Commissioner recognized it had already been reported and a tax paid thereon. In his sixty-day letter to the Zellerbach Paper Company, dated May 11, 1928, the Commissioner explained the transfer of this income to the consolidation, and added: "Adjustment will be made to A. S. Hopkins Company" (No. 37, R. 26).

No mention is made in the Opinion of the Circuit Court of Appeals of the facts in relation to the separate return filed on behalf of the A. S. Hopkins Company for the calendar year 1920. We state the facts primarily to correct a misstatement in the first paragraph of the Opinion of the Circuit Court of Appeals, i. e., that a consolidated return was filed by the Zellerbach Paper Company and its affiliated corporations, the National Paper Products Company and *A. S. Hopkins Company* for the year ended April 30, 1921, on July 16, 1921. Actually, this consolidated return was filed on behalf of Zellerbach Paper Company and its affiliates, National Paper Products Company and *Sanitary Products Corporation,* the latter company, however, having operated at a loss for the period.

The question we are concerned with is whether the statutory period for the making of an additiona

assessment began July 16, 1921, the date of the filing of the consolidated income and profits tax return on behalf of the affiliated group as above noted.

On the 27th day of February, 1925, Zellerbach Paper Company and National Paper Products Company each executed an "Income and Profits Tax Waiver" consenting to an extension of time within which the Commissioner might make additional assessments for the year ending April 30, 1921, to December 31, 1925 (No. 37, R. 82, 84). No other waivers by any of the companies involved were ever executed.

After the filing of the returns above referred to the Commissioner used said returns as a basis for auditing the books of the taxpayers, and on May 11, 1928 (nearly seven years after the filing of the consolidated return on July 16, 1921), issued deficiency notices as follows: To Zellerbach Paper Company (No. 37, R. 82); to Zellerbach Paper Company, as transferee of the A. S. Hopkins Company (No. 37, R. 87); and to National Paper Products Company (No. 37, R. 84). The amounts of these deficiencies were later changed slightly by stipulation of the parties, the petitioners herein reserving, however, the defense of the statute of limitations to the claims of the Commissioner. These stipulations appear at No. 37, R. 82-87.

The filing of the Consolidated Income and Profits Tax Return by the Zellerbach Paper Company on behalf of itself and its subsidiaries on July 16, 1921, occurred while the Revenue Act of 1918 (40 Stat. 1057) was in force. Under the provisions of this act (Sec. 236(c)) a specific exemption of $2000 was allowed a domestic corporation, which was deducted

from the net income of the taxpayer to determine the amount subject to tax. In the case of affiliated corporations filing a consolidated return, but one exemption of $2,000 was allowed (Section 240(a)).

On November 23, 1921, the Revenue Act of 1921 (42 Stat. 227) was adopted. Under the provisions of this act, if the net income of the corporation (or affiliated corporations) was in excess of $25,000 the $2000 was not allowable as an exemption (Section 236(b)). This provision of the new law, together with other income tax provisions, was retroactive to January 1, 1921 (Sec. 263).

The fiscal year of the affiliated group began May 1, 1920, and ended April 30, 1921; thus eight months of the fiscal year fell in the calendar year 1920, and four months in the calendar year 1921. Thus the exemption of $2,000 was reduced by one-third thereof and the taxes due from the taxpayers increased in a merely nominal amount.

After the adoption of the Revenue Act of 1921, and on March 16, 1922, the Commissioner caused to be issued Treasury Decision 3305 (printed in Appendix A, p. 56), which was amended by Treasury Decision 3310 (printed in Appendix A, p. 57), issued on March 28, 1922.

Briefly, these Treasury Decisions provided that if prior to November 23, 1921, a taxpayer had filed a return and paid a tax for a fiscal year ending in 1921, computed under the Revenue Act of 1918, *and it was subject to an additional tax for the same period,* under the Revenue Act of 1921, the return *cov-*

ering such additional tax should be filed at a certain time as therein set forth.

There were additional changes in the Revenue Act of 1921 leading to additional taxes in the cases of some taxpayers, none of which changes affected the taxpayers herein, or the returns filed. See Opinion of the Circuit Court of Appeals (No. 37, R. 126, 127).

The additional taxes due from the petitioners herein were ascertainable, of course, by the Commissioner himself and through a simple mathematical computation. Instead of the consolidated group being entitled to a $2000 exemption, it was entitled to but $1333.33, the balance thereof, to-wit, $666.67, being subject to tax at the rate of 10%, the tax amounting to $66.67, all as provided in the 1921 Act (Sec. 230).

No additional returns were filed by any of the petitioners herein after the adoption of the 1921 Act (No. 37, R. 82, 83, 86).

The Commissioner's sixty-day deficiency notices were not mailed until May 11, 1928, nearly seven years after the filing of the consolidated return on July 16, 1921.

The 1921 Revenue Act (Sec. 250(d)) provided for a four year statutory period (from the filing of a return), after which the Commissioner was barred; the 1918 Revenue Act (Sec. 250(d)) provided for a five year period.

The Commissioner asserted at the time of the issuance of the sixty-day letters on May 11, 1928, that the taxpayers had failed to file a return *under the*

1921 Revenue Act and that "no statute of limitations applies" (No. 37, R. 26; No. 38, R. 23; No. 39, R. 23).

SPECIFICATION OF ERRORS.

As set forth in our brief in support of our petition for writs of certiorari, we respectfully submit that the Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

A. In finding and holding that the collection of the deficiencies in question was not barred by the Statute of Limitations. Revenue Act of 1918, 40 Stat. 1057, Sec. 250(d) thereof; Revenue Act of 1921, 42 Stat. 227, Sec. 250(d) thereof;

B. In finding and holding that the Income and Profits Tax Return for the fiscal year ended April 30, 1921, filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, and in strict conformity with the Revenue Act of 1918, did not set the Statute of Limitations in motion;

C. In finding and holding that the Consolidated Income and Profits Tax Return filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921, which Act was retroactive as to the pertinent portions thereof as of January 1, 1921;

D. In finding and holding that the Revenue Act of 1921 required the filing of a new Income and

Profits Tax Return, which would differ from the return theretofore filed under the Revenue Act of 1918, only by the elimination of a portion of the $2000 exemption;

E. In affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company v. Helvering, No. 37 herein, which Order found that a deficiency was due from the said Zellerbach Paper Company in the sum of $69,114.02 (No. 37, R. 94);

F. In affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company as Transferee of A. S. Hopkins Company v. Helvering (No. 38 herein), which Order found that a deficiency was due from the said Zellerbach Paper Company, as transferee of A. S. Hopkins Company, in the sum of $1,744.37 (No. 38, R. 61).

G. In affirming the Order of the United States Board of Tax Appeals in National Paper Products Company v. Helvering, No. 39 herein, which Order found that a deficiency was due from the said National Paper Products Company in the sum of $32,990.18 (No. 39, R. 63).

SUMMARY OF ARGUMENT.

Introductory.

The Circuit Court of Appeals for the Fifth and Eighth Circuits, and the Court of Appeals of the District of Columbia have decided the exact question involved herein in favor of the Petitioners. There are no cases (other than Board of Tax Appeals cases)

exactly in point which have been decided against the Petitioners.

(1) The Consolidated Income and Profits Tax Return filed on July 16, 1921, while the 1918 Act was in force, was prepared and filed in strict compliance with that Act. The good faith and honesty of the taxpayers in preparing and filing this consolidated return have not been, and cannot be, questioned.

(2) The Revenue Act of 1918 (40 Stat. 1057), in effect at the time of the filing of the consolidated return on July 16, 1921, allowed as a deduction in arriving at net income the sum of $2000. The Revenue Act of 1921 (42 Stat. 227) was adopted on November 23, 1921, and was retroactive to January 1, 1921. This Act provided (Sec. 236) that if the net income of the taxpayers exceeded $25,000 the $2000 deduction was not allowable. The income of the consolidated group in the instant cases exceeded $25,000. One-third of the fiscal year ended April 30, 1921, was embraced within the 1921 Act. One-third of the exemption, therefore, was not allowable in arriving at net income.

(3) Assuming the Commissioner of Internal Revenue had the right to require the filing of a new or amended return after the adoption of the 1921 Act, the Treasury Decisions (Nos. 3305 and 3310) requiring such new or amended return clearly do not apply to the taxpayers herein.

(4) Respondent's position is that no return at all was filed under the 1921 Act, but every act of the Commissioner after the filing of the consolidated re-

turn proves that it was accepted as a return under that Act.

(5) The statutory period within which additional assessments might be made (or deficiency notices mailed) was four years under the 1921 Act. This period was extended in the instant cases by waivers executed by Zellerbach Paper Company and National Paper Products Company (which waivers were obtained prior to the running of the four year period), to December 31, 1925. The time within which additional assessments might be made (or deficiency notices mailed) expired on that date, and obviously the issuance of the notices on May 11, 1928, was too late.

(6) The Commissioner of Internal Revenue, Respondent herein, has confessed error in several cases involving the exact point involved herein, after decisions by the Board of Tax Appeals against taxpayers, and after appeals by these taxpayers to the Courts.

(7) Discussion of Opinion of Circuit Court of Appeals for the Ninth Circuit rendered herein (69 Fed. (2d) 852).

(8) Discussion of cases relied upon by the Respondent.

QUESTION PRESENTED.

The sole question is limitation, i. e., whether the Commissioner of Internal Revenue was barred from asserting or collecting the deficiencies claimed on May 11, 1928, the date of the issuance of his sixty-day deficiency letters. The Respondent's answer before

the Board of Tax Appeals admits this in the following language (No. 37, R. 76):

> "Admits * * * that the only issue before the Board for decision is whether deficiency is barred by the statute of of limitations."

See also No. 38, R. 42, and No. 39, R. 45.

That this is the sole question is also shown by the majority opinion of the Board of Tax Appeals, although a minor contention of the Commissioner is referred to and decided adversely to him (No. 37, R. 89). That the sole question is limitation is also shown by the dissenting opinion of the Board (No. 37, R. 90).

The Circuit Court of Appeals for the Ninth Circuit states the question as follows (No. 37, R. 127).

> "The sole question presented is whether or not the deficiency notice of May 11, 1928, was too late."

ARGUMENT.

Introductory.

The exact question involved herein has been decided in favor of the Petitioners in three cases, to-wit, *Myles Salt Company v. Commissioner,* 49 Fed. (2d) 232, decided by the Circuit Court of Appeals for the 5th Circuit, on April 21, 1931;

Isaac Goldmann Company v. Burnet, 51 Fed. (2d) 427, decided by the Court of Appeals of the District of Columbia, on June 29, 1931;

Valentine-Clark Company v. Commissioner, 52 Fed. (2d) 346, decided by the Circuit Court of Appeals for the 8th Circuit, on July 31, 1931.

There is a very minor variation between the facts in the *Isaac Goldmann Company* case, supra, and the instant cases, to-wit:

In the instant cases, the taxpayers did not file a new or amended return after the adoption of the 1921 Act on November 23, 1921; in the *Isaac Goldmann Company* case, an amended return *was* so filed for the purpose of correcting the item of invested capital (see 51 Fed. (2d) at 427).

That these three cases are exactly in point is recognized by the majority opinion of the Board of Tax Appeals in the instant cases in the following language (No. 37, R. 89):

> "The Board has consistently held in situations like the one here present that the return filed pursuant to the Revenue Act of 1918 is not sufficient to start the period of limitation."

Cases theretofore decided by the Board of Tax Appeals are cited, including the *Myles Salt Company*, the *Valentine-Clark Company* and the *Isaac Goldmann Company* cases, and the reversal of the Board in these three cases by the Courts is noted.

The dissenting opinion of the Board is in agreement. It reads as follows (No. 37, R. 90):

> "Van Fossan, dissenting: I am unable to agree with the prevailing opinion in these cases. The conclusions of the Board have been tested by appeal to the courts on three occasions and in each case the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Goldmann Co., 17 B. T. A. 1103;

reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. I believe the position taken by the Board in these and like cases has been erroneous and that in the instant case the petitioners should prevail.

"Marquette agrees with this dissent."

It is also recognized by the Circuit Court of Appeals that the three cases referred to are exactly in point. This is shown in the opinion of the Ninth Circuit Court in two companion cases now before this Court (October Term, 1934, Nos. 35, 36), and involving a fiscal year ending in 1925. The Circuit Court of Appeals' opinion is reported in 69 Fed. (2d) 857. The Court, after referring to and discussing the *Myles Salt Company, Valentine-Clark Company* and *Isaac Goldmann Company* cases, says, at page 863:

"In the companion case (C. C. A.) 69 F. (2d) 852 we have held that a return filed under the Revenue Act of 1918 could not be considered a return under the Revenue Act of 1921, if it did not show the deductions as authorized by the Act of 1921, although in the particular case involved the statutory deduction of $2,000 was the only change made in the return of the particular taxpayer. We have declined with all due respect to follow decisions to the contrary by co-ordinate courts. These decisions are pressed upon us here as a ground for reversing the action of the Board of Tax Appeals. It is not disputed by the Commissioner that the principle of those decisions is applicable to the case in hand. * * *

* * * * * * *

"We wish to make it clear that unless we are correct in holding that the decisions of our co-

ordinate courts are erroneous this case as well as the companion case should be reversed."

There are no Court decisions against the taxpayers, and involving the 1918 and the 1921 Revenue Acts.

The opinions in the *Myles Salt,* the *Valentine-Clark* and the *Isaac Goldmann* cases are printed in full in Appendix B.

The question is clear cut. Either the Circuit Courts of Appeals for the 5th and 8th Circuits and the Court of Appeals of the District of Columbia are correct, or the Board of Tax Appeals and Circuit Court of Appeals for the 9th Circuit are correct in reaching the opposite conclusion. The two groups of decisions cannot be reconciled and this Court must decide between them.

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(1) THE CONSOLIDATED RETURN WAS FILED IN STRICT COMPLIANCE WITH THE 1918 REVENUE ACT IN FORCE AT THE TIME OF FILING. THE GOOD FAITH AND HONESTY OF THE TAXPAYERS HAVE NOT BEEN QUESTIONED.

No question has ever been raised as to the good faith or honesty of the taxpayers in preparing their consolidated return for the fiscal year ended April 30, 1921, which was filed with the Collector of Internal Revenue in San Francisco, July 16, 1921.

We believe that an inspection of this return will show it was intended to and did convey all necessary information to the Commissioner which would enable him to determine whether the correct amount of tax had been reported. The best evidence of this fact is

that the return was used as the basis of the Commissioner's audit.

The return is on United States Internal Revenue Service Form 1120; it is supported by complete detailed schedules totalling over fifty pages, stated in consolidated form and separately, where necessary, for the parent company and its subsidiaries, including the following:

Balance sheets;

Analyses of surplus accounts and reconciliations thereof;

Details of gross income and deductions;

Schedules of depreciation;

Lists of dividends received;

Details of Liberty Bond exempt interest;

Schedules showing adjustments of book balance sheets for income tax purposes;

Copies of journal entries affecting the foregoing adjustments;

Schedules showing the computation of invested capital;

Schedule of inadmissible assets;

Inventory certificates.

With such a complete and detailed return before him it is little wonder that the Commissioner found it sufficient to undertake an audit thereof.

The original return, together with all schedules attached thereto, is before this Court for its inspection.

(2) THE REVENUE ACT OF 1918 IN EFFECT AT THE TIME OF THE FILING OF THE CONSOLIDATED RETURN ALLOWED AS A DEDUCTION THE SUM OF $2000; THIS EXEMPTION WAS ELIMINATED BY THE 1921 ACT WHERE THE NET INCOME EXCEEDED $25,000; THE 1921 ACT WAS RETROACTIVE TO JANUARY 1, 1921, AS A RESULT OF WHICH ONE-THIRD OF THE EXEMPTION OF $2000 CLAIMED BY THESE TAXPAYERS WAS ELIMINATED. NO OTHER CHANGES IN THE 1921 ACT NECESSITATED ANY CHANGES IN THE CONSOLIDATED RETURN OF THESE TAXPAYERS FILED BEFORE THE ADOPTION OF THAT ACT.

Section 236 of the 1918 Revenue Act provided in effect that for the purpose of determining the amount of net income subject to tax there should be allowed a credit, in the case of a domestic corporation, of $2000. The taxpayers herein claimed this exemption in their consolidated return filed July 16, 1921.

The Revenue Act of 1921 was adopted on November 23, 1921. Section 236 of this Act provided in effect that a credit of $2000 should not be allowed for the purpose of arriving at net income subject to tax where the net income exceeded $25,000.

Section 240(b) of the 1921 Act provided that where a consolidated return was filed there should be allowed in computing the income tax, only one specific credit (i. e., the sum of $2000) as provided in Section 236(b).

The net income of the affiliated group was admittedly in excess of the sum of $25,000.

Section 263 of the 1921 Act provided that Title II of said Act (called "Income Tax") should become effective as of January 1, 1921.

The fiscal year of the taxpayers ended April 30, 1921, as a result of which four months, i. e., January

to April, 1921, both inclusive, fell within the provisions of the newly adopted Act.

It is not denied that the effect of the above provisions of the 1921 Act was to eliminate one-third of the $2000 exemption claimed by the taxpayers in their consolidated return, resulting in the increase of taxable income by $666.67, and increasing the tax in the nominal sum of $66.67.

Other than the elimination of a part of the $2000 credit, there were no changes in the 1921 Act affecting the consolidated return filed by these taxpayers. In support of this, see the opinion of the Circuit Court of Appeals, 69 Fed. (2d) 852 at 853. See also the opinion of the Circuit Court in the companion case (involving a fiscal year ending in 1925), i. e., *National Paper Products Company v. Helvering,* 69 Fed. (2d) 857 at 863, reading as follows:

> "In the companion case (C. C. A.) 69 F. (2d) 852, we have held a return filed under the Revenue Act of 1918 could not be considered a return under the Revenue Act of 1921 if it did not show the deductions as authorized by the Act of 1921, *although in the particular case involved the statutory deduction of $2,000 was the only change made in the return of the particular taxpayer*" (Italics supplied).

(3) ASSUMING THE COMMISSIONER HAD THE RIGHT TO REQUIRE THE FILING OF A NEW OR AMENDED RETURN AFTER THE ADOPTION OF THE 1921 ACT, TREASURY DECISIONS 3305 AND 3310, CALLING FOR SUCH NEW OR AMENDED RETURN, CLEARLY DO NOT APPLY TO THE TAXPAYERS HEREIN.

We respectfully call the attention of the Court to Treasury Decision 3305, issued by the Commissioner of Internal Revenue on March 16, 1922, and printed in Appendix A at page 10.

This Treasury Decision reads in part as follows:

> "If any taxpayer has before November 23, 1921, filed a return for a fiscal year *ending in 1921,* and paid or become liable for a tax computed under the Revenue Act of 1918, *and is subject to additional tax for the same period* under the Revenue Act of 1921, *the return covering such additional tax* shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922", etc. (Italics supplied).

Treasury Decision 3310, printed in Appendix A at page 11, issued by the Commissioner on March 28, 1922, and amending Treasury Decision 3305, contains similar language. We submit it is perfectly obvious that the above quotation from Treasury Decison 3305 shows that the Commissioner had in mind the case of a taxpayer where changes in the 1921 Act necessitated a new return without which the Commissioner would be unable to audit the returns and properly determine and compute the amount of tax due.

Note that the Commissioner refers specifically to a fiscal year ending in 1921, such as, for instance, the

fiscal year of these taxpayers, which ended April 30, 1921, and that he calls for a new return only if such taxpayer is subject to additional tax *"for the same period under the Revenue Act of 1921."* Note that such return is to be filed for the purpose only of *"covering such additional tax."*

The fact is that taxpayers in the instant cases were not subject to any additional tax "for the same period" as theretofore covered in the return filed, i. e., the twelve months period ending April 30, 1921. On the contrary, the only period affected in so far as these taxpayers were concerned, was the four months period beginning January 1, 1921, and ending April 30, 1921.

We submit that the Commissioner himself did not desire a new return, and did not call for a new return from taxpayers situated as these taxpayers were and demonstrated conclusively he did not need a new or any additional return as he acted on the only return ever filed. In fact, the Commissioner could easily have determined the additional tax due by a simple mathematical computation.

In fact, the Board of Tax Appeals has held that he should have done so, for, in the case of *Conrad Hardware Co.,* 8 B. T. A. 512, the Board decided that a return, complete in all details except for the actual computation of the tax, was a valid return, the filing of which started the running of the Statute of Limitations against the Government. And, what is more important, the Commissioner of Internal Revenue acquiesced in that decision. (See VII—1 Cumulative Bulletin 7.)

The 1921 Act (Sec. 250(b) thereof) provided for the examination of the return by the Commissioner "as soon as practicable after the return is filed" for the express purpose of determining whether or not the correct amount was reported and computed therein. The point was considered by the Court in *Isaac Goldmann v. Burnet,* supra, the opinion in relation thereto reading as follows:

> "The Commissioner himself realized the confusion and waste inevitable if the returns already made were wholly disregarded and new ones required, and, in Treasury Decision 3310, demanded new returns from taxpayers who had, under the 1918 act, made returns for the fiscal year ending during 1921 only in those cases in which the taxpayer was subject to specific additional taxes under the 1921 act. *The purpose of this ruling, obviously, we think, was to provide a new return only in those cases where, under the provisions of the latter act, a liability for other or additional taxes was created through a change in the basis of computation, necessitating other information or new figures to allow the Commissioner to determine the tax liability under the Act.* (Italics supplied.)

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(4) RESPONDENT'S POSITION IS THAT NO RETURN AT ALL WAS FILED UNDER THE 1921 ACT, BUT EVERY ACT OF THE COMMISSIONER AFTER THE RECEIPT OF THE CONSOLIDATED RETURN PROVES THAT IT WAS ACCEPTED AS A RETURN UNDER THAT ACT.

We have already dealt with the completeness of the consolidated return filed July 16, 1921. We have

pointed out no question has been raised as to the honesty or good faith of the taxpayers in preparing and filing this return.

Upon the adoption of the new Revenue Act on November 23, 1921, there were three classes of returns subject to the Commissioner's consideration. First, returns theretofore filed by taxpayers with fiscal years ending in 1921, which were not affected by the new act; secondly, returns which complied with the new law except for the elimination of a part of the $2000 credit; and finally, returns which needed to be amended by reason of substantial changes in the law affecting this group of taxpayers.

The consolidated return herein fell within the second classification.

This return was not rejected by the Commissioner; on the contrary, it was accepted by him as the return of the taxpayers named therein, for the fiscal year ended April 30, 1921.

Section 200 of the new law defined the term "taxable year" and stated: "The *first taxable year* to be called the taxable year 1921, shall be the calendar year 1921 *or any fiscal year ending during the calendar year 1921.*" (Italics supplied.) The return here was filed July 16, 1921, six and a half months *after* the 1921 Act became operative under the retroactive provisions of Section 263 of the new law.

Upon the adoption of the 1921 Revenue Act this return clearly became a return under the new law and certainly was accepted by the Commissioner as such. Nor did the Commissioner demand a new or

amended return as he was entitled to do under the provisions of Section 1307 of the 1921 Act.

And at the time of filing the return the Commissioner accepted the first installment of tax due thereunder, and thereafter accepted the additional installments until the full amount reported was paid.

On February 27, 1925, realizing that almost four years had elapsed since the filing of the return, and also apparently realizing that unless an extension of time to make additional assessments was obtained prior to July 16, 1925, he would be barred, the Commissioner requested and obtained from the Zellerbach Paper Company and National Paper Products Company, waivers extending his time to December 31, 1925.

The Commissioner certainly could not have been of the opinion on February 27, 1925, that no return had been filed under the 1921 Revenue Act, otherwise he would not have asked for these waivers.

Finally, the Commissioner must have recognized the anomalous position he was in, when on May 11, 1928, he issued sixty-day letters to the several taxpayers. The Schedules attached to this sixty-day letter are headed:

> "Statement of Returns Examined and Resulting Tax Liability (No. 37, R. 24).

Almost immediately following, the Commissioner says:

"Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds no statute of limitations applies" (No. 37, R. 26).

And under the heading "Schedule 1", the Commissioner states:

> "Net income *as disclosed by return,* $532,238.29" (No. 37, R. 27).

To what *return* is the Commissioner here referring?

There was only *one* consolidated return filed, covering the fiscal year ended April 30, 1921; the parties so stipulated (No. 37, R. 86).

In dealing with the question of depreciation, the Commissioner says: "Restored on *Return*" and "Deducted on *Return,*" setting forth the figures (No. 37, R. 31).

And finally, in connection with this phase of the matter, the Commissioner shows the original assessment of taxes against Zellerbach Paper Company and National Paper Products Company *was in accordance with the amounts reported in the consolidated return filed July 16, 1921.* For example:

"National Paper Products Company		
Total tax liability allocated Schedule 12		$56,070.44
Previously assessed: Account #400,016, July, 1921.		
Consolidated return	$83,118.56	
Less: Allocated to Zellerbach Paper Company *on basis of income reported*	58,189.64	24,928.92
Additional tax		$31,141.52"

(In quoting from the Commissioner's letter, italics have been supplied.)

(No. 37, R. 48, and see a similar recital at p. 49).

As was said by the Court in *Valentine-Clark Company v. Commissioner,* supra:

> "The position that the return was a nullity is evidently an after thought, arising when the question of the Statute of Limitations was raised."

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(5) THE 1921 ACT PROVIDES A STATUTORY PERIOD OF FOUR YEARS AFTER THE FILING OF A RETURN, WITHIN WHICH AN ADDITIONAL ASSESSMENT MIGHT BE MADE OR A SIXTY-DAY LETTER ISSUED; THIS TIME WAS EXTENDED BY WAIVERS TO DECEMBER 31, 1925; THE ISSUANCE OF SIXTY-DAY LETTERS ON MAY 11, 1928, WAS TOO LATE.

Section 250(d) of the 1921 Revenue Act provides that the amount of income tax due under any return made under the Act shall be determined and assessed by the Commissioner within four years after the return was filed.

In view of the acceptance by the Commissioner of the consolidated return filed by the taxpayers herein on July 16, 1921, the Commissioner's "assessment" of the tax reported therein (No. 37, R. 48, 49); and his use of the return as the basis of his audit, we cannot see how it can be successfully contended that "no return was filed."

It is our contention the time within which additional taxes might have been assessed, or a sixty-day letter issued, would ordinarily have expired July 16, 1925, four years after the return was filed.

The Commissioner was apparently of this belief also.

On February 27, 1925 (before the expiration of the four year period), the Commissioner requested and obtained from the Zellerbach Paper Company a waiver reading as follows:

> "In pursuance of the provisions of existing Internal Revenue Laws Zellerbach Paper Company, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes *due under any return made* by or on behalf of said taxpayer for the fiscal year ended April 30, 1921, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals, then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board."
>
> (No. 37, R. 79, 80) (Italics supplied).

The above waiver was duly executed by officers of the corporation. A similar waiver was procured from National Paper Products Company.

The time to make additional assessments or to issue a sixty-day letter was thereupon extended *beyond* the four year period and to December 31, 1925. No additional waivers were obtained. The Commissioner

(for what reason has never been divulged) withheld the issuance of his sixty-day letters for two years four months eleven days *after* the expiration of the period within which such letters might properly have been issued.

We contend that on May 11, 1928, nearly seven years after the return was filed, the Commissioner was barred.

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(6) THE COMMISSIONER OF INTERNAL REVENUE, RESPONDENT HEREIN, HAS CONFESSED ERROR (OR FAILED TO PROSECUTE) IN SEVERAL CASES INVOLVING THE EXACT POINT INVOLVED HERE, AFTER DECISIONS BY THE BOARD OF TAX APPEALS AGAINST TAXPAYERS, AND AFTER APPEALS BY THESE TAXPAYERS TO THE COURTS.

We will now show that the Commissioner of Internal Revenue in three cases involving exactly the same type of facts and exactly the same point of law, after decisions in favor of the Commissioner by the Board of Tax Appeals, and the filing of Petitions for Review of these decisions by the taxpayers, confessed error in two cases, and moved to dismiss in the third case.

> *Gus Holstine Dry Goods Company, Petitioner, v. Commissioner, Respondent,* 16 B. T. A. 1124.

It appears from the decision of the Board of Tax Appeals in this case that the taxpayer filed its return for the fiscal year ended February 28, 1921, on or before June 15, 1921. No further return was filed respecting that year. The Commissioner's deficiency letter was issued December 30, 1928.

In the return filed the taxpayer took as a deduction the $2000 credit allowed under the 1918 Revenue Act. The taxpayer conceded that this credit was reduced by $366.67 under the provisions of the 1921 Act, and that this resulted in a small additional tax.

The Board held that a return was necessary under the 1921 Act and, no such return having been filed, the statute of limitations had not run.

The taxpayer filed a Petition for Review with the Court of Appeals of the District of Columbia. The case is docket No. 5354 in that Court.

The Commissioner, through his attorneys, filed with the above entitled Court on *September 8, 1931,* his "Confession of Error", and on *September 10, 1931,* the Court reversed the decision of the Board of Tax Appeals. (See Vol. 342 C. C. H., p. 2069, second column. This is a recognized Federal tax service published by Commerce Clearing House, Inc.)

Adams, Cushing & Foster, Inc., Petitioner, v. Commissioner, Respondent, 19 B. T. A. 89.

This case is also on all fours with the instant case.

The taxpayer filed its return for the fiscal year ended January 31, 1921, on April 14, 1921.

The taxpayer claimed a credit of $2000 in its return, to which it was entitled under the 1918 Act, but under the 1921 Act it was entitled to a credit of but eleven-twelfths of that amount or $1833.34. No additional return was filed after the adoption of the 1921 Act covering the fiscal year in question.

The deficiency notice was issued on March 18, 1926, more than four years after the filing of the return.

The Board of Tax Appeals relied upon its decision in *Myles Salt Company, Ltd.*, 18 B. T. A. 742 (which decision was thereafter reversed), and held the statute of limitations had not run.

The taxpayer filed with the Circuit Court of Appeals for the First Circuit a Petition for Review of the Board's decision. The case is numbered 2566 in the Circuit Court.

On *September 10, 1931,* the Commissioner, through his attorneys, filed with the Circuit Court his Confession of Error and the Board's decision was thereupon reversed. (See Vol. 342 C. C. H., p. 2069.)

G. Corrado Coal & Coke Interests, Inc., Petitioner, v. Commissioner, Respondent, 19 B. T. A. 691.

In this case it appears the taxpayer filed its return for the fiscal year ended May 31, 1921, on August 15, 1921. In its return the Petitioner claimed a credit of $2000 in accordance with Section 236(c) of the Revenue Act of 1918. Under the Revenue Act of 1921 the taxpayer was entitled to but seven-twelfths of this credit. No other return for the fiscal year in question was filed.

The deficiency letter was mailed to the taxpayer on March 5, 1927, long after the statutory period as provided in the 1921 Act had expired.

The Board relied upon its decision in *Valentine-Clark Company,* 14 B. T. A. 562 (which decision was thereafter reversed), and decided in favor of the Commissioner.

The taxpayer filed with the Circuit Court of Appeals for the Third Circuit, a Petition to Review the

decision of the Board. The case is numbered 4545 in the Circuit Court. On motion of the Commissioner himself, made on May 26, 1931, the case was dismissed for lack of proper prosecution by the Petitioner, i. e. the Commissioner. (See Vol. 342 C. C. H., p. 2069.)

It is interesting to note certain dates in relation to the above matters. The *Myles Salt Company* case, supra, was decided by the Fifth Circuit in favor of the taxpayer *on April 21, 1931.*

In the *G. Corrado Coal & Coke Interests* case, supra, the Commissioner moved to dismiss on *May 26, 1931.*

The Court of Appeals of the District of Columbia then decided the *Isaac Goldmann Company* case, supra, in favor of the taxpayer on *June 29, 1931,* and this was followed by a similar decision in favor of the taxpayer by the 8th Circuit in the *Valentine-Clark Company* case on *July 31, 1931.*

Following these decisions, the Commissioner confessed error in the *Gus Holstine Dry Goods Company* case, supra, and in the *Adams, Cushing & Foster Company* case, both on *September 10, 1931.*

The opinions of the Board of Tax Appeals in the instant cases were promulgated on May 17, 1932.

(7) DISCUSSION OF OPINION OF CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED HEREIN (69 FED. (2d) 852).

The opinion of the Ninth Circuit Court of Appeals herein shows *inter alia:*

1. That the consolidated return was a comprehensive document, containing lists and schedules of various kinds, and totaling over fifty pages (No. 37, R. 125).

2. That the Commissioner's audit of this return was also comprehensive, covering twenty-nine pages of the printed transcript (No. 37, R. 126).

3. That no changes in the consolidated return were made necessary by the Revenue Act of 1921 other than the change in the $2000 exemption (No. 37, R. 126) (and see opinion in the companion cases, 69 Fed. (2d) 863).

4. That the sole question is whether or not the deficiency notices of May 11, 1928, were too late (No. 37, R. 127).

5. That the question submitted to the Court has been decided against the contention of the Commissioner by two Circuit Courts of Appeals, and by the Court of Appeals of the District of Columbia (No. 37, R. 127).

There is a statement in the opinion, however, which should be corrected. The opinion reads:

> "The petitioners in the case at bar do not contend that their return shows either the 'deductions' allowed by the Revenue Act of 1921 or the 'net income' as fixed by that Act, but they do claim that the return they made July 16, 1921, did show the gross revenue, the deductions therefrom and the net revenue under the Revenue Act

> of 1918 in force at the time the return was made, and that their failure to show the net income in accordance with the subsequently enacted Revenue Act of 1921 was not their fault because it was impossible to know what the Revenue Act of 1921 would require" (No. 37, R. 128, 129).

On the contrary, the petitioners *do* contend that the return filed showed not only the "deductions" allowed by the 1921 Act, but also the "net income" as fixed by that Act, with such a minor variation that it is of no consequence.

The "deductions" claimed were exactly those deductions allowable under both the 1918 and 1921 Revenue Acts with the single exception of one-third of the $2000 credit claimed in the return.

And the "net income" reported was in accordance with the requirements of the 1921 Act except for the nominal increase of $666.67, resulting from the elimination of one-third of the $2000 credit.

Of course the Commissioner in his audit of the return increased very materially the net income, and hence the tax due, but these increases were *not* the result of changes in the 1921 Act. As was said in the opinion in the companion cases: "In the particular case involved, the statutory deduction of $2000 was the only change made in the return of the particular taxpayer."

Many cases have held that mistakes and omissions do not invalidate the return. For instance, see *Lancaster Lens Co.*, 10 B. T. A. 1153.

> "Regarding the year 1918 the respondent contends that the return filed on April 25, 1919, was

> not the return required by statute in that it did not include all items of income and deductions; that the amended return filed in 1925 was the return so required; and that in any event the voluntary filing of the amended return amounted in effect to the waiving of the Statute of Limitations. * * * *In our opinion it is immaterial that the return filed on April 25, 1919, did not include all the income or deductions. There is no intimation that the return was fraudulently filed or that it did not disclose what the petitioner's officers believed was the correct tax liability at the time.*"

See also *Commissioner v. Stetson & Ellison Co.* (C. C. A. 3), 43 Fed. (2d) 553, wherein the Court stated:

> "The Commissioner further says that the consolidated returns were not returns for the respondent because they did not fully comply with the statute. ***In other words, he charges that they were defective,*** in that the income, invested capital, and deductions were not separated. But the return did include, as the Board found, the gross income, deductions, and credits in totals for the consolidated group, including the gross income, deductions, and credits of the respondent."

We think the gist of the Circuit Court opinion is to be found at page 856 of the reported case (or see No. 37, R. 139) reading as follows:

> "If Congress expressly provided for a return by the taxpayer for its fiscal year 1920-1921 as it clearly did, we do not see how the taxpayer can insist that a return filed by it before the Revenue Act of 1921 was enacted and which did not comply with the Revenue Act of 1921, started

the running of the limitation under the Revenue Act of 1921 for making the assessment under that act, nor do we see how the phraseology of the decision of the Commissioner which expressly required the filing of a return can be held to excuse the filing of a return on the theory that he adopted a return theretofore filed when that return is impliedly repudiated by the decision which expressly requires a new return in lieu thereof as a sufficient basis for an assessment of the tax under the Revenue Act of 1921."

A complete reply to this statement and to the opinion of the Circuit Court of Appeals herein is to be found in the case of *Myles Salt Company v. Commissioner,* supra:

> *"If it had been filed or refiled the day after the Act of 1921 was passed, it would have been clearly good; the error in the deductible credit being easily remediable by the Commissioner without further information from the taxpayer.* But it is said that because it was filed before the Act was passed it cannot be a return under the Act. The Act itself, however, is retroactive, declaring itself to be effective as of January 1, 1921. If in effect on that date for other purposes, why should it not speak from that date as to filing returns? Difficulty can arise only concerning returns for fiscal years ending during 1921. Congress had them in mind, for in Section 205 (a) it was provided: 'If a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be' arrived at on a basis stated. Entirely conscious, therefore, that such returns had already been filed before the Act was passed on November 23rd, the only provision Congress made as to filing them

was Section 227 (a): 'Returns * * * shall be made on or before the 15th day of the third month following the close of the fiscal year.' If this requirement is read as of January 1st the return in question was filed in literal compliance with it. That it was the intent of Congress thus to ratify and adopt returns filed between January 1st and the passing of the Act also appears from its repeal of the former Act as of January 1st, so that there was no law except the Act of 1921 that could apply to such returns" (Italics supplied).

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(8) DISCUSSION OF CASES RELIED UPON BY THE RESPONDENT.

The cases relied upon by the Respondent in the Court below are as follows:

(1) *United States v. Updike,* 1 Fed. (2d) 550, decided on August 15, 1924, by the Nebraska District Court, Omaha Division.

(2) *Updike v. U. S.,* 8 Fed. (2d) 913, decided on December 1, 1925, by the Circuit Court of Appeals for the 8th Circuit; this was an affirmance of *U. S. v. Updike,* 1 Fed. (2d) 550, supra.

(3) After the Circuit Court of Appeals decision hereinabove mentioned, a petition was filed by the taxpayer for a writ of certiorari. This was denied on April 19, 1926. See *Updike v. U. S.,* 271 U. S. 661, 70 L. Ed. 1138.

(4) *United States v. Updike,* 25 Fed. (2d) 746, decided on April 13, 1928, by the Nebraska District Court, Omaha Division.

(5) *Updike v. U. S.,* 32 Fed. (2d) 1, decided on May 29, 1929, by the Circuit Court of Appeals for the 8th Circuit; this was an affirmance of *U. S. v. Updike,* 25 Fed. (2d) 746, supra.

(6) *U. S. v. Updike,* 281 U. S. 489; 74 L. Ed. 984, decided by the Supreme Court May 19, 1930, and being an affirmance of the decision reported in 32 Fed. (2d) 1, see supra. The Supreme Court, however, did not pass upon the question involved herein.

(7) *Whitney Bodden Shipping Co. v. U. S.,* 52 Fed. (2d) 1003, decided on October 20, 1931, by the Court of Claims.

(8) *Ralston Purina Co. v. U. S.,* 58 Fed. (2d) 1065, decided June 6, 1932, by the Court of Claims.

(9) *Globe Excelsior Oak Tanning Co. v. U. S.,* 2 Fed. Supp. 470, decided February 6, 1933, by the Court of Claims.

(10) *Clifton Manufacturing Co. v. U. S.,* 3 Fed. Supp. 508, decided on January 31, 1933, by the District Court, W. D. South Carolina.

(11) *Clifton Manufacturing Co. v. U. S.,* 70 Fed. (2d) 102, decided on April 3, 1934, by the Circuit Court of Appeals for the 4th Circuit. This was an affirmance of the case reported in 3 Fed. Supp. 508, supra.

We doubt the desirability or usefulness of a tedious analysis of these several cases. There are certain general observations which we shall make, however, which apply to all of them.

First: All of these cases involve returns filed under the 1916 Revenue Act (39 Stat. 756), the 1917 Revenue Act (40 Stat. 300) or the 1918 Revenue Act (40 Stat. 1057). None of the cases involves a consideration of the 1921 Revenue Act (42 Stat. 227) as do the instant cases.

The language of the Court of Claims in *Globe Excelsior Oak Tanning Co. v. U. S.*, 2 Fed. Supp. 470, decided on February 6, 1933, distinguishes all cases of this type from the *Myles Salt Company, Isaac Goldmann Company* and *Valentine-Clark Company* cases, and the instant cases.

From the opinion at page 472:

> "The cases cited by plaintiff (Myles Salt Co. v. Commissioner (C. C. A.), 49 F. (2d) 232; Isaac Goldmann Company v. Burnet, 60 App. D. C. 265, 51 F. (2d) 427, and Valentine-Clark Company v. Commissioner (C. C. A.), 52 F. (2d) 346), all involve situations which arose under the Revenue Act of 1921 with respect to a reduction in the allowable specific exemption from that allowable under the prior act, *and are in no sense controlling under the Revenue Act of 1918, when the information required in a return under that act was often radically different (as in the case at bar) from that required under the prior act.*" (Italics supplied.)

Second: The Court of Claims does not mention the *Myles Salt Company* case or similar cases in the opinion in *Whitney Bodden Shipping Company v. U. S.*, 52 Fed. (2d) 1003, decided on October 20, 1931, nor are these cases mentioned in the Court of Claims'

opinion in *Ralston Purina Company v. U. S.*, 58 Fed. (2d) 1065, decided June 6, 1932. In our opinion the failure of the Court of Claims to mention the *Myles Salt* group of cases was not an oversight, but a deliberate ignoring of these cases for the reason they involve situations arising under the 1921 Revenue Act and were clearly inapplicable. This is evidenced by the language of the Court of Claims in the *Globe Excelsior Oak Tanning Company* case (quoted above) distinguishing earlier cases.

Third: The *Updike* cases, supra, are not even remotely referred to in *Myles Salt Company,* supra, decided by the Circuit Court of Appeals for the 5th Circuit on April 21, 1931. The same is true of the Court of Appeals of the District of Columbia in *Isaac Goldmann Company v. Burnet,* decided June 29, 1931, and also of *Valentine-Clark Company,* supra, decided by the Circuit Court of Appeals for the 8th Circuit on July 31, 1931. This latter is particularly significant, as the *Valentine-Clark Company* case was decided by the same Circuit Court (the 8th) which decided *Updike v. U. S.,* 8 Fed. (2d) 913, on December 1, 1925.

Here again the ignoring of the *Updike* cases by the 8th and 5th Circuit Courts of Appeals, and the Court of Appeals of the District of Columbia, could not have been an oversight, but was deliberately done, in our opinion, by reason of the nonapplicability of those cases to the question under consideration.

Fourth: The District Court opinion in *Clifton Manufacturing Company v. U. S.,* 3 Fed. Supp. 508,

decided January 31, 1933, distinguishes the *Myles Salt,* the *Isaac Goldmann* and *Valentine-Clark* decisions in the following language (3 Fed. Supp. 508 at 518):

> "Among the cases cited in plaintiff's brief are the following: Myles Salt Co. v. Commissioner, 49 F. (2d) 232, 233 (C. C. A. 5); Isaac Goldmann Co. v. Burnet, 60 App. D. C. 265, 51 F. (2d) 427; Valentine-Clark Co. v. Commissioner, 52 F. (2d) 346 (C. C. A. 8); Adams, Cushing & Foster, Inc., 19 B. T. A. 89 (dismissed by C. C. A., First Circuit, upon confession of error).
>
> "In the first case mentioned, a tax return was filed for the fiscal year ending in 1921, before the enactment of the 1921 Revenue Act. After the passage of the act, no new or amended return was filed or requested. No change was effected by the new act pertaining to the taxpayer's liability, except that by the new act it was deprived of a credit of some $2,000 on its net income, thus increasing its tax about $35. It was held that the return which would date the beginning of the limitation period and lack of which would prevent limitation is one made in substantial conformity to the law which required it. The court held that a return which starts the running of the statute 'must purport to cover the entire period involved, and must show the items of gross income, deductions, and credits of the taxpayer with such definiteness as to permit an assessment of the tax, if accepted as correct'. In that case the return was retained by the Commissioner, together with the money paid on it, and later on an audit of it was had, in 1923, without request for any amendment of it. *Under the cir-*

cumstances shown, we have no reason to question the correctness of the court's decision as limited to the exact point in issue.

"Likewise, in the case of Isaac Goldmann & Co. v. Burnet, supra, the issues involved an overlapping return for the twelve-month period ending April 30, 1921. In that case the court held 'We can find no provision in the Revenue Act of 1921 which requires the filing of a new return from taxpayers using the fiscal year basis, in cases where a return had been duly filed under existing law, except, perhaps, *in those cases in which, under the 1921 act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved.*' (Italics ours.) The court held further: 'In this instance, the taxpayer had filed the return it was required to file under the then prevailing law, and paid the tax. The new law was in all respects the same as the old so far as its tax liability was concerned. The repetition of the figures already filed would have been a wholly vain and useless proceeding.' This case followed the ruling laid down in the case of Myles Salt Co. v. Commissioner, supra. It is evident from the opinion that only one return was filed, and such expressions in the opinion as relate to the running of the statute from the date of the first return, if a second return had been filed, is mere obiter.

"The case of Valentine-Clark Co. v. Commissioner, supra, also arose under the provisions of the act of 1921, and related to an overlapping return for the fiscal year ending January 31, 1921. This case cites as authorities and follows

> the two cases above discussed. As in the other cases, it is necessary to consider the exact facts surrounding the case, in order to appreciate the distinction between it and the case at bar; and the final decision arrived at, in order to be properly appreciated, must be considered in connection with the reservations set out in the opinion." (Italics supplied).

In affirming the holding of the District Court in the *Clifton Manufacturing* case, the Circuit Court of Appeals for the 4th Circuit, says (70 Fed. (2d) 102):

> "We are in accord with the conclusion stated in the opinion of Judge Watkins in the District Court, 3 Fed. Supp. 508" etc.

The Circuit Court then refers to the opinions in the instant cases (69 Fed. (2d) 852) and the companion cases (69 Fed. (2d) 857).

The 4th Circuit Court, it seems, is inconsistent. It approves of the *conclusion* reached by the District Court in the *Clifton Manufacturing Company* case (3 Fed. Supp. 508) which *distinguished* the *Myles Salt* and similar cases, but it also approves of the decisions of the 9th Circuit in the instant cases, and companion cases, despite the fact it is conceded the instant cases are on all fours with the *Myles Salt* and similar cases.

We think that it can be fairly stated that broad distinctions are recognized by the Courts hereinafter listed between what we might call the Myles Salt

group of cases, involving situations arising under the 1921 Act and the *Updike* and similar cases, arising under earlier Acts. These Courts are:

Court of Claims: Distinguishes the two groups of cases in *Globe Excelsior Oak Tanning Co. v. U. S.*, 2 Fed. Supp. 470; decided February 6, 1933.

U. S. District Court, W. D., South Carolina distinguishes the two groups of cases in *Clifton Manufacturing Company v. U. S.*, 3 Fed. Supp. 508, decided January 31, 1933.

Court of Appeals of the District of Columbia: Impliedly recognized the distinction by failing to mention the Updike type of case in its opinion in *Isaac Goldmann Co. v. Burnet,* 51 Fed. (2d) 407, decided June 29, 1931.

Fifth Circuit Court of Appeals: Here also the Court fails to mention cases involving the 1916, 1917 and 1918 Revenue Acts in its opinion in *Myles Salt Company v. Commissioner,* 49 Fed. (2d) 232, decided on April 21, 1931.

Eighth Circuit Court of Appeals: No mention is made by this Court of the cases involving the earlier Revenue Acts in its opinion in *Valentine-Clark Company v. Commissioner,* 52 Fed. (2d) 346, decided September 31, 1931.

On the other hand, the following Courts do not seem to make any distinction between the two groups.

Fourth Circuit Court of Appeals: This Court, in *Clifton Manufacturing Company v. U. S.*, 70 Fed.

(2d) 102, decided April 3, 1934, involving a situation arising under the 1918 Act, refers with approval to the instant cases involving the 1921 Act. The Court is not entirely consistent, however, as it approves of the conclusion reached by the District Court (3 Fed. Supp. 508) in the same case, the District Court, however, having *distinguished* the two groups.

Ninth Circuit Court of Appeals: This Court, of course, relies on cases under earlier Revenue Acts, in deciding the instant cases and companion cases, which arose under the 1921 Act.

In our opinion, the decisions of the 5th and 8th Circuit Courts and Court of Appeals of the District of Columbia are the better reasoned and we believe the Ninth Circuit Court of Appeals should be reversed.

CONCLUSION.

We respectfully submit that the consolidated income and profits tax return filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on July 16, 1921, for the fiscal year ended April 30, 1921, while the 1918 Revenue Act was in force became the return required under the Revenue Act of 1921 on its adoption on November 23, 1921, and which was retroactive to January 1, 1921.

We submit that this return was retained by the Commissioner and adopted by him as the return required by the Revenue Act of 1921; that it was used

by him as the basis of his audit for the fiscal year in question; that it served as the basis of his deficiency notices issued to the several taxpayers on May 11, 1928, and that the filing of said returns was a compliance with the provisions of the 1921 Revenue Act.

We submit that the small additional tax resulting from the elimination of one-third of the $2000 exemption under the provisions of the 1921 Act could have been and actually was, computed and determined by the Commissioner, and that the necessity of making this slight computation did not justify the Commissioner in withholding the issuance of his deficiency notice for a period exceeding six years after the return was filed.

We submit that the four year period of limitations provided in the 1921 Act was set in motion July 16, 1921, the date of the filing of the consolidated return; that the waiver obtained by the Commissioner on February 27, 1925, within which an additional assessment might be made (or deficiency notices mailed) expired December 31, 1925, and no additional waivers having been obtained the Commissioner was thereupon barred.

We submit that taxing acts, including periods of limitation embodied therein, must be construed liberally in favor of the taxpayer. *U. S. v. Updike,* 281 U. S. 489, 496, 74 L. ed. 984, 991; *Bowers v. N. Y. and A. Lighterage Co.,* 273 U. S. 346, 349, 71 L. ed. 676, 678.

And finally, we submit that the Circuit Court of Appeals for the 9th Circuit, has reached incorrect con-

Appendix A

PERTINENT PARTS OF THE REVENUE ACT OF 1918, 40 STAT. 1057.

As to the filing of returns:

"Section 227 (a). That returns shall be made on or before the 15th day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March."

As to the $2000 credit or exemption:

"Section 236. That for the purpose only of the tax imposed by Section 230 there shall be allowed the following credits * * *

* * * * * * *

(c) In the case of a domestic corporation, $2000."

As to corporation returns generally:

"Section 239. That every corporation subject to taxation under this Title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title."

As to consolidated returns:

"Section 240 (a). *That corporations which are affiliated within the meaning of this section shall,* under regulations to be prescribed by the Commissioner with the approval of the Secretary, *make a consolidated return* of net income and invested capital for the purposes of this title and Title III, *and the taxes thereunder shall be com-*

puted and determined upon the basis of such returns * * *

In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit of $2000 (as provided in section 236); * * *

(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

As to the time of filing corporate returns:

"Section 241 (a). That returns of corporations shall be made at the same time as is provided in Subdivision (a) of Section 227."

As to the necessity of the Commissioner examining the return:

"Section 250 (b). As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed * * *

If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. In such case, if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

If the understatement is false or fraudulent with intent to evade the tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns wilfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the amount of the deficiency."

As to the Statute of Limitations:

"Section 250 (d). Except in the case of false or fraudulent returns with intent to evade the tax, *the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made,* and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be deter-

clusions in the several cases involved herein, and should be reversed.

Dated, San Francisco, California,
September 19, 1934.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioners.

(Appendices Follow.)

mined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

As to the right of the Commissioner to demand a return:

"Section 1305. * * *

Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax."

PERTINENT PARTS OF THE REVENUE ACT OF 1921, 42 STAT. 227.

As to the "first taxable year" under the Act of 1921:

"Section 200. That when used in this title

(1) The term 'taxable year' means the calendar year, *or the fiscal year ending during such calendar year,* upon the basis of which the net income is computed under section 212 or section 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. *The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921;*"

"Section 205. (a). That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in [illegible]21, his tax under this title for the taxable y[illegible]921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of

1918 at the rates for the calendar year 1920, which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this Title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period."

As to the time of filing returns:

"Section 227 (a). That returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March."

As to the 1921 Act superseding the 1918 Act:

"Section 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount."

As to the credit or exemption allowed domestic corporations:

"Section 236. That for the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

* * * * * * *

(b) In the case of a domestic corporation the net income of which is $25,000 or less, a specific credit of $2000; but if the net income is more than $25,000 the tax imposed by section 230 shall not exceed the tax which would be payable if the $2000 credit were allowed, plus the amount of the net income in excess of $25,000;"

As to corporate returns generally:

"Section 239 (a). That every corporation subject to taxation under this title and every personal service corporation shall mak a return, stating specifically the items of its gross income and the deductions and credits allowed by this title."

As to consolidated returns:

"Section 240 (a). That corporations which are affiliated within the meaning of this section may, for any taxable year beginning on or after January 1, 1922, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return * * *

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportion as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. *There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.*

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

* * * * * * *

"(e) Corporations which are affiliated within the meaning of this section shall make consolidated returns for any taxable year beginning prior to January 1, 1922, in the same manner and subject to the same conditions as provided by the Revenue Act of 1918."

As to the time of filing corporate returns:

"Section 241 (a). That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 277, * * *"

As to the necessity of the Commissioner examining the return:

"Section 250 (b). As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed * * *

If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called 'deficiency'), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due (or, if paid on the installment basis, on the deficiency of each install-

ment from the time the installment was due), *shall be paid upon notice and demand by the collector.* If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of 1 per centum per month on the amount of such deficiency in the tax from the time it was due (or, if paid on the installment basis, on the amount of the deficiency in each installment from the time the installment was due), which penalty and interest shall become due and payable upon notice and demand by the collector. If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns wilfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector."

As to the Statute of Limitations:

"Section 250 (d). The amount of income, excess profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or

under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled, 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed * * *"

As to the effective date of the "Income Tax" provisions:

"Section 263. That this title shall take effect as of January 1, 1921."

As to the right of the Commissioner to demand a return:

"Section 1307. That whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax."

As to the repeal of the 1918 Act by the 1921 Act:

'Section 1400 (a). That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

Title II (called 'Income Tax') as of January 1, 1921;"

Section 3176 of the Revised Statutes as amended by Section 1103 of the Act of February 26, 1926, is in part as follows:

> "If any * * * corporation * * * fails to make and file a return * * * at the time prescribed by law or by regulation * * *, the collector or deputy collector *shall* make the return * * * from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector."
>
> * * * * * * *
>
> "In case of any failure to make and file a return * * * the Commissioner of Internal Revenue * * * *shall* add to the tax 25 per centum of its amount * * *"
>
> "The amount so added to any tax shall be collected at the same time and in the same manner and as part of the tax * * *"

TREASURY DECISIONS.

Treasury Decision 3305, issued by the Commissioner of Internal Revenue under date of March 16, 1922, reads as follows:

> "If any taxpayer has before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under

the Revenue Act of 1918, *and is subject to additional tax for the same period* under the Revenue Act of 1921, the return *covering such additional tax* shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the law and regulations, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. If no part of the tax for the taxpayer's fiscal year was due until after November 22, 1921, the whole amount of tax due, including the tax due under the original return *and the additional tax due under the new return,* will be payable in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. Attention is directed to the provisions of sections 214 (a) 9 and 234 (a) 8 of the Revenue Act of 1921.

D. H. Blair,
Commissioner of Internal Revenue."

T. D. 3310, issued by the Commissioner under date of March 28, 1922, reads as follows:

"T. D. 3305, approved March 16, 1922, is amended to read as follows:

If any taxpayer has, before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under the Revenue Act of 1918, *and is subject to additional tax for the same period* under the Revenue Act of 1921, *a return covering such additional tax* shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the laws and

regulations, and payment of such additional tax will be due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. Attention is directed to the provisions of sections 214 (a) 9 and 234 (a) 8 of the Revenue Act of 1921.

D. H. Blair,
Commissioner of Internal Revenue."

(Italics supplied throughout.)

Appendix B

THE FOLLOWING IS THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN MYLES SALT CO. v. COMMISSIONER, 49 FED. (2d) 232, RENDERED ON APRIL 21, 1931:

"The sole question is limitation. On May 16, 1921 (May 15th was Sunday), Myles Salt Company filed its income tax return for its fiscal year ending February 28th, 1921, and paid the tax shown by it, all according to the Revenue Act of 1918 then in force (40 Stats. 1057). On November 23rd, 1921, the Revenue Act of 1921 was approved, effective as to its income tax provisions as of January 1st, 1921 (Section 263), and repealing as of January 1st, 1921, the corresponding provisions of the Revenue Act of 1918 (Section 1400). No change was made affecting the tax of this taxpayer except that, because its net income exceeded $25,000.00, it was deprived since January 1st of the credit of $2000.00 allowed by Section 236 (42 Stat. 257), thus increasing its tax about $35.00. *No new or amended return showing this changed computation was filed or requested.* On September 17, 1926, the Commissioner sent out a deficiency notice preparatory to assessing an additional tax arising mainly from corrections in the deductions claimed for depletion and inventory losses. Before the Board of Tax Appeals the taxpayer claimed that the assessment was barred by the provisions then in force of the Revenue Act of 1926, Section 277 (a) (2), 26 U. S. C. A. 1057 (a) (2), 'The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 * * * shall be assessed

within four years after the return was filed'. By Section 200 (1) of the Act of 1921 (42 Stat. 227) the taxable year 1921 included fiscal years ending during 1921. The Board held, three members dissenting, that no lawful return had been filed for the fiscal year in question, and no bar had attached because of Section 278 (a) of the Act of 1926 (26 U. S. C. A. 1058). 'In case of a false or fraudulent return with intent to evade the tax or a failure to file a return the tax may be assessed * * * at any time'.

The return which will date the beginning of the limitation period, and lack of which will prevent limitation, is one made in substantial conformity to the law which required it. The Act of 1918 and that of 1921 in Section 239 (40 Stat. 1081, 42 Stat. 259 both require 'Every corporation * * * shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer.' It is no return as respects limitation if made tentatively and not intended to be the basis of an assessment, *Florsheim Brothers v. United States,* 280 U. S. 453, 50 S. Ct. 215, 74 L. Ed. 542; or if not sworn to at all, *Lucas v. Pilliod,* 281 U. S. 245, 50 S. Ct. 297, 74 L. Ed. 829, 67 A. L. R. 1315. It must purport to cover the entire period involved, and must show the items of gross income, deductions and credits of the taxpayer with such definiteness as to permit an assessment of the tax, if accepted as correct. *United States v. National Tank & Export Co.* (C. C. A.), 45 Fed. (2d) 1005. *Perfect accuracy*

and completeness is not necessary, for there could rarely be an additional tax assessed except on some correction of the return, and, if the need of correction is held to make it no return, such deficiency assessments would never be barred. If, on the other hand, the return is so false as to show fraud and intent to evade the tax, there is by the special provision above quoted no limitation. The Board found no fraud or bad intent in this return. *If it had been filed or refiled the day after the Act of 1921 was passed, it would have been clearly good; the error in the deductible credit being easily remediable by the Commissioner without further information from the taxpayer.* But it is said that, because it was filed before the Act was passed it cannot be a return under the Act. The Act itself, however, is retroactive, declaring itself to be effective as of January 1, 1921. If in effect on that date for other purposes, why should it not speak from that date as to filing returns? Difficulty can arise only concerning returns for fiscal years ending during 1921. Congress had them in mind, for in Section 205 (a) it was provided: 'If a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be' arrived at on a basis stated. Entirely conscious, therefore, that such returns had already been filed before the Act was passed on November 23rd, the only provision Congress made as to filing them was Section 227 (a): 'Returns * * * shall be made on or before the 15th day of the third month following the close of the fiscal year.' If this requirement is read as of January 1st the return in question was filed in literal compliance with it.

That it was the intent of Congress thus to ratify and adopt returns filed between January 1st and the passing of the Act also appears from its repeal of the former Act as of January 1st, so that there was no law except the Act of 1921 that could apply to such returns. This intent is further shown by the history of the legislation, for this same situation arose when the Act of 1918, approved February 24th, 1919 (40 Stat. 1057), retroactively displaced the Act of 1917. Its Section 227 (a) was identical with that just quoted, and was interpreted by Treasury Decision 2797, whereby fiscal year returns filed before the Act was passed were treated as sufficient, and were referred to as the 'original return', but if an additional tax was due under the new Act 'a return covering such additional tax' only was required, and called an 'amended return.' Thus in no case was the original return treated as a nullity, but as valid so far as it went. By a settled principle Congress is to be considered as having adopted this official construction when it reenacted the same words in the new law. *United States v. G. Falk & Bro.*, 204 U. S. 143, 27 S. Ct. 191, 51 L. Ed. 411; *Stairs et al. v. Peaslee*, 18 Howard 521, 15 L. Ed. 474. Many decisions of the Board of Tax Appeals have held that returns filed before the law was passed are not nullities, but sufficient to date the beginning of limitation if no additional tax was imposed on the particular taxpayer by the law, although the return was actually incorrect and the tax paid insufficient. *Ley & Co., Inc.*, 9 B. T. A. 749; *Palmetto Coal Co.*, 11 B. T. A. 154; *Denholm & McKay Co.*, 15 B. T. A. 225. *This return was retained by the Commissioner, together with the money paid on*

it. An audit of it was had in 1923 without request for any amendment of it. The deficiency letter of September 17th, 1926, states that 'An audit of your income and profits tax return for the fiscal year ended February 28, 1921, has resulted', etc., and the statement attached is based upon the figures of the return; so that the additional tax is proposed to be assessed on the return. These things are mentioned not as raising an estoppel to deny that it is a return, but as further tending to show that it was treated in administrative practice as, and understood to be, a duly filed return and practically sufficient as such until the question of limitation was raised. We hold that limitation is to be dated from its filing on May 16th, 1921. We do not inquire whether the tax for the period prior to January 1st, 1921, which is by Act of 1921, Section 205 (a), to be measured by the provisions of the Act of 1918, is imposed by the one Act or the other, since the limitation period applicable to either had expired when the assessment was attempted. The entire assessment is barred. The petition for review is granted, and the case is remanded for further proceedings not inconsistent herewith."

THE FOLLOWING IS THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN ISAAC GOLDMANN CO. v. DAVID BURNET, 51 FED. (2d) 427, RENDERED ON JUNE 29, 1931:

"Groner, Associate Justice:

Appellant kept its books and made its tax returns on the fiscal year basis. Its taxable year 1920-1921 was the twelve months' period ending

April 30, 1921. On July following, it filed its return under the provisions of the Revenue Act of 1918 (40 Stat. 1057), showing net income of $82,964.70 and a resulting tax liability of $15,830.26. Gross income was properly shown, the schedules required by Treasury regulations were attached, and the honesty and good faith of the return is not questioned. More than four years later the Commissioner made a deficiency assessment.

On November 23, 1921, the Revenue Act of 1921 was passed, and its provisions made retroactive as of January 1. (Sec. 263, 42 Stat. 227, 271.) The only effect of the 1921 act, so far as it concerned appellant's tax liability for the period January 1 to the end of appellant's fiscal year—April 30, 1921—was to limit proportionately appellant's right to a specific exemption, allowed under the 1918 act but not allowed under the 1921 act, to the period prior to January 1. The result of this was to make appellant liable, under the new act, for a small additional tax. The Commissioner claims that this fact made necessary the filing by appellant of a new return, and that its subsequent filing of an amended return, pursuant to Treasury Decision 3220, should either be treated as the only return for the fiscal year period in controversy, or else appellant should be regarded as never having filed any return, and that, in either case, the deficiency assessment would be within the limitation period.

Treasury Decision 3220, issued the latter part of 1921, was designed to correct a practice apparently then more or less general on the part of taxpayers in using 'appreciated' values in determining invested capital, and required, from such

as had, an amended return within ninety days. The bulletin confined the requirements of the return to such additional information only as should be necessary to show the correct values to redetermine the amount of tax to be assessed. In obedience to this bulletin, and for the purpose only of correcting the item of invested capital as shown in the former returns, appellant, still claiming the 1918 exemption, filed on January 14, 1922, an amended return, and the question which we have to answer is whether the four-year period of limitations began to run with the filing of the original return in July, 1921, because if it did not, the additional assessment is valid. The Board held, following *Hutchinson Co. v. Commissioner,* 14 B. T. A. 367, 8, that because the 1921 Act abolished the $2000 exemption, appellant owed additional taxes under the provisions of that act, and, inferentially at least, since it owed additional taxes, it owed likewise the duty of filing a return with specific reference to the 1921 Act, and that, until it did so, the limitation did not begin to run.

In this conclusion, we find ourselves unable to agree. We can find no provision in the Revenue Act of 1921 which requires the filing of a new return from taxpayers using the fiscal year basis, in cases where a return had been duly filed under existing law, except, perhaps, in those cases in which, under the 1921 Act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved. *The Commissioner himself realized the confusion and waste inevitable if the returns already made were wholly disregarded and new*

ones required, and, in Treasury Decision 3310, demanded new returns from taxpayers who had, under the 1918 Act, made returns for the fiscal year ending during 1921 only in those cases in which the taxpayer was subject to specific additional taxes under the 1921 Act. The purpose of this ruling, obviously, we think, was to provide a new return only in those cases where, under the provisions of the latter act, a liability for other or additional taxes was created through a change in the basis of computation, necessitating other information or new figures to allow the Commissioner to determine the tax liability under the Act.

In this instance, the taxpayer had filed the return it was required to file under the then prevailing law, and paid the tax. The new law was in all respects the same as the old so far as its tax liability was concerned. The repetition of the figures already filed would have been a wholly vain and useless proceeding. *The elimination of the part of the exemption not allowable after January 1 was a simple computation appearing from the returns filed, and the adjustment of this item to conform to the new law needed neither explanation nor new returns.* The new act provided the occasion, and the return furnished the basis, and the act itself imposed on the Commissioner (250 (b)) Revenue Act 1921, the duty of examination to the end that the correct tax should be ascertained. The retroactive provisions of the 1921 Act present no novelty, for the 1918 Act itself replaced retroactively the 1917 Act. Under the provisions of the 1918 Act, the tax was increased over that exacted under either the 1916 or 1917 Act, but,

under its provisions as to filing returns on the fiscal year basis, the Commissioner ruled (Treasury Decision 2797) that the new return required was satisfied by inclusion only of the items embracing the additional tax, and spoke of the former returns, i. e., those filed before the Act was approved, as original returns, and the additional returns required as supplemental or amended returns, and while we do not invoke this use of words as foreclosing the question or as controlling, we nevertheless think it clearly reflects the real situation, and that, in this aspect, the returns filed by appellant were, especially in view of the admission that they were in all respects honestly believed to represent the true state of appellant's liability, valid returns and not a nullity. *The case turns, we think, upon this: If the original returns filed by appellant were, as the Board apparently thought, a nullity, then, obviously, the deficiency assessment was in time, but if, on the contrary, they were valid returns susceptible of amendment by the Commissioner in the ascertainment of the correct tax, or requiring only a corrected return in eliminating that portion of the exemption which was abolished by the later act, then, equally, obviously, the deficiency assessment was made too late.* It was conceded, in the opinion of the Supreme Court in *Florsheim Brothers v. United States,* 280 U. S. 453, 462, 50 S. Ct. 215, 218, 74 L. Ed. 542, that the filing of a return, though defective or incomplete, is 'sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period.' It was likewise held in *Willingham Loan Co. v. Commissioner* (C. C. A. 5), 36 F. (2d) 49, that the statute begins to run

whenever the taxpayer has filed returns with the Commissioner *which show facts upon which the proper assessment for the taxable period may be made.* See also *Thomas v. United States* (D. C.), 22 F. (2d) 1000. The Board of Tax Appeals has also held that this is the rule. See *Appeal of National Refining Co. et al.,* 1 B. T. A. 236; *Appeal of New York Trust Co.,* 3 B. T. A. 583; *Lancaster Lens Co. v. Commissioner of Internal Revenue,* 10 B. T. A. 1153.

To say that the original return filed by appellant in this case is no return, though filed in strict conformity to the law then prevailing is, we think, wholly incorrect. To call the return which it later filed to conform to a ruling of the Department—a thing in itself wholly unresponsive to anything in the 1921 Act—a new return, wholly unrelated to the other, is, we think, equally incorrect. Appellant, under the method which it had adopted with the consent of the Department, was required to file its returns within three months after the expiration of its fiscal year, and to pay its tax. If it had failed to do either, it would have made a default subjecting it to penalty. If it had filed a dishonest report, it would have been subject to still further penalty. As it happened, it did precisely what the law, as it then was, required it to do, and now to say that, because of the retroactive provisions of the new act, what it did was a nullity, is, it seems to us, without justification or support. If more was required, it was supplementary and not original, and hence, as the Supreme Court said, did not toll the statute. We do not mean to say that the Commissioner might not have required the filing of additional returns to make those already filed conform to the new law, but

such new returns, if filed for that purpose, would, as we think, have relation to the original return, and the latter, rather than the former, would be the starting point for the limitation.

The precise question here involved was likewise involved in *Myles Salt Co. v. Commissioner* (decided by the Fifth Circuit C. C. A., April 21, 1931), 49 Fed. (2d) 232, and it was decided there, as we think correctly, that the original return established the period from which the limitations began to run.

Reversed."

THE FOLLOWING IS THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IN VALENTINE-CLARK CO. v. COMMISSIONER, 52 FED. (2d) 346, RENDERED ON JULY 31, 1931:

"Booth, Circuit Judge, delivered the opinion of the Court.

This is a petition for review of an order of the Board of Tax Appeals which redetermined a deficiency in the income and profits taxes of petitioner for the fiscal year ending January 31, 1921. The determination of the Commissioner of Internal Revenue was upheld.

The facts are not in dispute. The petitioner, taxpayer, kept its books during the taxable period involved on the basis of a fiscal year ending January 31, 1921. April 14, 1921, the taxpayer filed its return for the fiscal year showing a net income of $37,527.43. In due course, it paid taxes on that basis. After the enactment of the Revenue Act of 1921 (November 23, 1921 (42 Stat. 227)), the taxpayer filed no other or further return for the fiscal

year ending January 31, 1921. No waiver of the statutory limitation period on assessment or collection of the 1921 income or profits taxes was executed or filed with the Commissioner of Internal Revenue by the taxpayer. No notice was served upon the taxpayer requiring a further return or statement as provided by Section 1305 of the Revenue Act of 1918 (40 Stat. 1142), and by Section 1307 of the Revenue Act of 1921 (42 Stat. 310). June 3, 1926, the Commissioner mailed to the taxpayer the so-called sixty-day deficiency letter, provided for in Section 274 (a) of the 1926 Revenue Act (26 U. S. C. A. 1048), showing a net income for the fiscal year ending January 31, 1921, of $46,734.04, and a deficiency in tax due from the taxpayer for said fiscal year of $5777.35. No part of said sum of $5777.35 has been assessed against the taxpayer either before or since the mailing of said deficiency letter, and no part of said sum has been paid by the taxpayer.

There is no provision in the Revenue Act of 1921 requiring a corporation, which, prior to the passage of that Act, had filed its return for a fiscal year ending in 1921, to file any additional return for such year.

In the return filed by the taxpayer on April 14, 1921, an exemption of $2000 was used and this was allowable under the 1918 Revenue Act (Sec. 236, 40 Stat. 1080); but this exemption was not allowable under the 1921 Revenue Act inasmuch as the taxable income of the petitioner exceeded $25,000.00 (1921 Revenue Act, Sec. 236, 42 Stat. 257).

By Sections 263 and 338 of the Revenue Act of 1921 (42 Stat. 271, 277), the provisions of the Act included in Titles II and III, Sections 200-338

(relating to income taxes and profits taxes), were made retroactive, taking effect as of January 1, 1921.

Accordingly, the taxpayer was not entitled to the full exemption claimed of $2000, but only to eleven-twelfths thereof, or $1833.33, since the 1918 Act applied to the first eleven months of the fiscal year ending January 31, 1921.

Apart from this slight discrepancy, the return of the taxpayer filed April 14, 1921, was in accord with the provisions of the 1921 Revenue Act, and the discrepancy was apparent on the face of the return.

In making up the schedules attached to the deficiency letter dated June 3, 1926, the Commissioner made use of the return of the taxpayer, which was filed April 14, 1921, and among other matters made correction of the discrepancy above mentioned.

Relevant statutory provisions are set out in the margin. (These statutory provisions are omitted in this brief.)

The question presented by the present petition for review is whether the applicable period of limitation had run prior to the sending out by the Commissioner of the sixty-day deficiency letter of June 3, 1926.

The Commissioner takes the position that the Statute of Limitations contained in the 1921 Revenue Act is the one applicable; the taxpayer contends that the Statute of Limitations contained in the 1924 Revenue Act is the one applicable.

Inasmuch as the period of limitation is the same (four years from the filing of the return)

under either statute, we pretermit discussion of the question, which statute governed.

The Board of Tax Appeals stated its view of the case as follows:

'*It is stipulated that in the return filed the taxpayer took an exemption in the amount of $2000 in the computation of tax due under the Act of 1918, and that under the Act of 1921, it was not entitled to any such exemption for the fiscal year ended January 31, 1921.* It is obvious, therefore, that an additional tax for the fiscal year ended January 31, 1921, was imposed on this taxpayer by the Revenue Act of 1921. In such circumstances the Commissioner by his regulations, supra, required an additional return. Such return has never been filed, and, therefore, there is no return of this taxpayer for the year ended January 31, 1921, which can be regarded as the return required by law and no date from which the statute of limitations started to run against this petitioner for such taxable year.'

Counsel for the Commissioner on this petition for review take a somewhat different view. In their brief their position is thus stated:

'In this case the statute could be satisfied only by the filing of a return *under* the Revenue Act of 1921. This necessarily means a return filed in response to the requirements of the 1921 Act, and this requirement could not have been satisfied before the statute was enacted',

and again:

'The return under the Act of 1921 could be made only after the enactment of that law. It follows that only upon the filing of a return for the taxable year 1921 some time after the passage of the 1921 Act could the statutory bar begin to

operate. Since petitioner has filed no such return, the Commissioner was and is free to assert a deficiency.'

We cannot agree with either of the positions thus stated. We do not think that it was the intention of Congress that all returns for fiscal years ending in 1921 which were filed prior to the passage of the Revenue Act of 1921 should be considered nullities.

Viewing the facts in the light of the various statutory provisions quoted, we think it is clear that the taxpayer filed its return within the proper time; that the return contained the required information as to the various items; that the error in respect to the exemption appeared on the face of the return, and required no additional information for its correction.

The return would unquestionably have been valid and would have set the Statutes of Limitations in motion if it had been filed the day after the approval of the Revenue Act of 1921; but that Act, by its terms, became effective January 1, 1921. It speaks as of that date, and we have no difficulty in holding that returns filed after January 1, 1921, which contained the information required by the Act were returns *under* the Act. That such was the intent of Congress, we think is shown by the provisions of Sec. 205 (a) of the Act (42 Stat. 232) which reads:

'That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: * * * (followed by a stated basis);'

and the same section further provides:

'Any amount paid before or after the passage of this Act on account of the tax imposed for such

fiscal year by Title II of the Revenue Act of 1918 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of Section 252.'

These provisions, when read in connection with Sec. 1400 of the Revenue Act of 1921, (42 Stat. 320), which repealed the Revenue Act of 1918 as of January 1, 1921, and in connection with Section 227 (a) and 241 (a), (42 Stat. 251, 260), which fixed the time for filing returns, *show conclusively, in our judgment, that Congress intended to ratify and adopt the returns filed between January 1, 1921, and the passing of the Act of 1921.* Such a situation was not new. The Revenue Act of 1918, approved February 24, 1919, was also retroactive in its operation. It contained sections practically identical with Sections 227 (a), 241 (a), and 205 (a) of the Revenue Act of 1921. The returns filed before the 1918 Act was passed for fiscal years ending in 1918 were not treated as nullities but as 'original returns'; and if an additional tax was imposed by the Revenue Act of 1918, an additional return or an amended return only was required. See T. D. No. 2797.

Still further, the Commissioner himself, in preparing the sixty-day deficiency letter of June 3, 1926, did not treat the return of the taxpayer, filed April 14, 1921, as a nullity. On the contrary, he made full use of it as a basis for his deficiency letter. We mention this fact not as a ground for waiver or estoppel, but solely as showing that the Government officials whose duty it was to pass upon returns did not hold this par-

ticular return to be a nullity. *The position that the return was a nullity is evidently an afterthought, arising when the question of the Statute of Limitations was raised.*

As to the effect of T. D. Nos. 3305 and 3310, set out in the margin, it may well be doubted whether the 'additional tax' therein mentioned covers or was intended to cover a partial loss of exemption, such as occurred in the case at bar, wherein no new tax was to be levied and no new basis of taxation to be applied. But even if this view is not correct, yet said Treasury Decisions do not purport to make returns already filed nullities, but recognize them and simply call for a further return as to the additional tax.

In the case at bar, no such further return was necessary. The information contained in the return as filed was sufficient and was demonstrated so to be by the Commissioner himself. The filing of a second return after the passage of the Revenue Act of 1921 would have been a useless repetition.

We hold that the return filed April 14, 1921, was made by the taxpayer in good faith and in substantial conformity to both the Revenue Act of 1918 and the Revenue Act of 1921. Such return was not tentative, and was intended as the basis of an assessment. It showed the items of gross income, deductions and credits of the taxpayers. It covered the entire period involved. It was properly signed and verified. *The fact that it contained an inaccuracy did not cause it to become a nullity. United States v. Mabel Elev. Co.,* (D. C.) 17 F. (2d) 109. The Board of Tax Appeals has so held in numerous cases. Mabel Elev.

Co., 2 B. T. A. 517; Indiana Rolling Mills Co., 13 B. T. A. 1141; Darling-McDuff Coal Co., 15 B. T. A. 110; Denholm & McKay Co., 15 B. T. A. 225. And the mere fact that the return was filed before the Revenue Act of 1921 was passed did not cause it to become a nullity. Such has been the ruling of the Board of Tax Appeals in numerous cases. Fred T. Ley & Co., Inc., 9 B. T. A. 749; M. Brown & Co., 9 B. T. A. 753; Keystone Coal & Mining Co., 10 B. T. A. 295; Palmetto Coal Co., 11 B. T. A. 154; Denholm & McKay Co., supra.

It follows from the foregoing that the return was valid and was the return required by existing law; and that the Statute of Limitations began to run from April 14, 1921, the date when the return was filed.

The question involved in this case has been passed upon, and the same conclusion reached, by the Circuit Court of Appeals for the Fifth Circuit in the case of *Myles Salt Co. v. Commissioner,* 49 F. (2d) 232; also by the Court of Appeals of the District of Columbia in the case of *Isaac Goldmann Co. v. Commissioner,* 51 Fed. (2d) 427.

We are in full accord with the well-reasoned opinions in both of these cases, and with the conclusions reached.

The petition for review in the case at bar is granted, and the cause is remanded to the Board of Tax Appeals for further proceedings not inconsistent with the views herein expressed". (Italics supplied).

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 1039

ZELLERBACH PAPER COMPANY, A CORPORATION
petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

No. 1040

ZELLERBACH PAPER COMPANY, A CORPORATION, AS Transferee of A. S. Hopkins Company, petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

No. 1041

NATIONAL PAPER PRODUCTS COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

59596—34

Pursuant to the Revenue Act of 1918, a return was filed for the fiscal year ending April 30, 1921. The Revenue Act of 1921 was enacted on November 23, 1921. Since it was effective as of January 1, 1921, it altered the tax liability in question. However, no new return was made under the 1921 Act. A deficiency letter was mailed on May 11, 1928. The question involved is whether the taxpayer has failed to file a return under the Revenue Act of 1921, so as to prevent the running of the statute of limitations for determining deficiencies.

The decision of the court below held that the return filed under the 1918 Act did not operate to start the running of the period of limitation under the 1921 Act. This decision is in accord with many decisions of the Board of Tax Appeals. It is also supported by two decisions involving the 1917 and 1918 Acts. *Globe Excelsior Oak Tanning Co.* v. *United States,* 2 F.Supp. 470 (C.Cls.), certiorari denied, 290 U.S. 627; *Clifton Mfg. Co.* v. *United States,* C.C.A. 4th, decided April 3, 1934. The decision below, however, is in direct conflict with the decisions in *Valentine-Clark Co.* v. *Commissioner,* 52 F. (2d) 346 (C.C.A. 8th); *Goldmann Co.* v. *Burnet,* 51 F. (2d) 427 (App.D.C.), and *Myles Salt Co.* v. *Commissioner,* 49 F. (2d) 232 (C.C.A. 5th).

Although we believe that the decision below is correct, we do not oppose the present petition because of the conflict of decisions.

Respectfully submitted.

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FRANK J. WIDEMAN,
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MAY 1934.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 37

ZELLERBACH PAPER COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

No. 38

ZELLERBACH PAPER COMPANY, A CORPORATION, AS Transferee of A. S. Hopkins Company, petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

No. 39

NATIONAL PAPER PRODUCTS COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, AS COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Board of Tax Appeals [1] is reported in 26 B. T. A. 96. The opinion of the Circuit Court of Appeals [2] is reported in 69 F. (2d) 852.

JURISDICTION

The judgments of the Circuit Court of Appeals [3] were entered February 28, 1934. A joint petition for writs of certiorari was filed May 10, 1934, and granted June 4, 1934.[4] The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a tax return filed under the Revenue Act of 1918, prior to the enactment of the Revenue Act of 1921, started the running of the statute of limitations for taxes assessable retroactively under the Revenue Act of 1921.

2. Whether in any event the petitioners' returns were so incomplete and misleading as not to start the running of the statute of limitations.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, p. 16.

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[1] No. 37, R. 89–91; No. 38, R. 56–58; No. 39, R. 58–60.
[2] No. 37, R. 125–141; No. 38, R. 93; No. 39, R. 93.
[3] No. 37, R. 142; No. 38, R. 94; No. 39, R. 94.
[4] No. 37, R. 146; No. 38, R. 97; No. 39, R. 97.

These three cases relate to the taxes of affiliated corporations. The parties have stipulated the correctness of the deficiency in each case, leaving merely the question as to whether the assessment and collection of the deficiencies have been barred by the statute of limitations. All three cases were disposed of in one opinion both by the Board of Tax Appeals and the Circiut Court of Appeals.[5]

Under the Revenue Act of 1918, the Zellerbach Paper Company (petitioner in No. 37) filed on July 16, 1921, a consolidated income tax return for the fiscal year ending April 30, 1921, on behalf of itself and its subsidiaries, National Paper Products Company (petitioner in No. 39) and Sanitary Paper Products Company. The return disclosed net income in excess of $500,000 for the Zellerbach Company, and in excess of $200,000 for the National Paper Products Company.

During the period from November 1, 1920, to April 30, 1921, A. S. Hopkins Company (petitioner in No. 38) was affiliated with Zellerbach Paper Company, National Paper Products Company, and Sanitary Products Corporation within the provisions of Section 240 of the Revenue Acts of 1918 and 1921. (No. 38, R. 52.) On March 15, 1921, the Zellerbach Company designated itself as successor to the Hopkins Company and filed a return in the name of the latter for the full calendar year 1920.

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[5] See footnotes 1 and 2, *supra*. The records have been separately printed.

(No. 38, R. 53.) The Zellerbach Company itself and its other two affiliates, the National Paper Products Company and the Sanitary Products Corporation, kept their books on the basis of the fiscal year ending April 30. (No. 38, R. 53.) In the consolidated return filed by the Zellerbach Company and these two affiliates for the fiscal year ending April 30, 1921, the income of the Hopkins Company for the first four months of 1921 was included as part of the income of the Zellerbach Company. (*Ibid.*)

After the enactment of the Revenue Act of 1921, no other return was filed by any of the petitioners for the fiscal year ending April 30, 1921. On May 11, 1929, a notice of deficiency in the sum of $69,114.02 was mailed to the Zellerbach Paper Company (No. 37, R. 82); a notice of deficiency in the sum of $1,744.37 covering the period from November 1, 1920, to April 30, 1921, was mailed to the Zellerbach Company, as transferee of the Hopkins Company (No. 38, R. 52, 54); and a notice of deficiency of $32,990.18 was mailed to the National Paper Products Company. (No. 39, R. 53.)

In each of these cases, the Board of Tax Appeals held that the returns by petitioners filed under the Revenue Act of 1918 did not start the running of the statute of limitations.[6] The Circuit Court of Appeals affirmed the decision.[7]

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[6] No. 37, R. 89–91; No. 38, R. 56–58; No. 39, R. 58–60.

[7] No. 37, R. 125–141; No. 38, R. 93; No. 39, R. 93.

1. The Revenue Act of 1921, upon its enactment, became the only revenue statute applicable to the taxes in question. A four-year period of limitations is applicable to taxes imposed by the Act. To start the running of this period, a return under the 1921 Act was required to be filed. The only return filed by petitioners was under the 1918 Act. The 1921 Act was different in many respects from the 1918 Act, and the liability thereunder was changed. Congress clearly did not intend to adopt for the 1921 Act the returns filed under the earlier statute. Accordingly, the statute of limitations did not start running and deficiencies could be assessed and collected at any time.

2. Even assuming that a return filed under the 1918 Act might serve the function of a return under the 1921 Act, nevertheless the return filed by these petitioners was so incomplete and misleading as not to start the running of the statute of limitations. The return failed to answer certain questions and contained a misleading answer to another question. Moreover, it did not show in any way that one of the affiliated group was included in the return and made no segregation of the information respecting that affiliate. It thus did not contain sufficient information upon which the Commissioner could assess the tax. Accordingly, the return was not of such a character as to be sufficient to start the period of limitations.

I

THE REVENUE ACT OF 1921 WAS THE ONLY STATUTE APPLICABLE TO THE TAXES OF THE PETITIONERS, AND SINCE THEY DID NOT FILE A RETURN UNDER THAT ACT DEFICIENCIES AGAINST THEM COULD BE ASSESSED AT ANY TIME

Upon the enactment of the Revenue Act of 1921 it became the only revenue statute applicable to petitioners' fiscal year ending April 30, 1921. The Revenue Act of 1921 was approved November 23, 1921, to "take effect as of January 1, 1921." (Sec. 263, *infra,* p. 18.) Under Section 230 of this Act (*infra,* p. 17) corporations were taxed for "each taxable year." The "taxable year" was defined as a calendar year, or a fiscal year ending during such calendar year; and the first taxable year, "to be called the taxable year 1921", was defined as the calendar year 1921 "or any fiscal year ending during the calendar year 1921." (Sec. 200, *infra,* p. 16.) Thus, the fiscal year ending April 30, 1921, was, under the express definition of the statute, "the first taxable year" thereunder for petitioners. This period was governed exclusively by the Act of 1921, since the same statute repealed "as of January 1, 1921" that portion of the Revenue Act of 1918 applicable to the taxes here in question. (Sec. 1400, *infra,* p. 18.)

A four-year period of limitations is applicable to "taxes imposed by the Revenue Act of 1921

* * * for the taxable year 1921." (Revenue Act of 1926, Sec. 277a (2), *infra*, p. 19.) To start the running of this period of limitation, a return under the 1921 Act was required to be filed. (Sec. 278 (a), Revenue Act of 1926, *infra*, p. 20.) This Act provided that every corporation subject to taxation thereunder should "make a return, stating specifically the items of its gross income and the deductions and credits allowed *by this title.*" (Sec. 239 (a), *infra*, p. 17; italics supplied.)

A return was filed under the 1918 Act covering the period in question. But the applicable provisions of the 1918 Act were repealed as of January 1, 1921, and the tax liability under the 1918 Act, for which the return was made, was wiped out. A different liability thereupon arose under a new and different statute which specifically required the filing of a return. And in using the word "return" in the 1921 Act, Congress clearly required information to be supplied in a prescribed manner responsive to the 1921 Act and not to the earlier Act. In *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, 460, this Court stated:

> * * * in providing that the period of limitation should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that *the period was to commence only when the taxpayer had supplied this information in the prescribed manner.* (Italics supplied.)

Congress must have been cognizant of the fact that some returns had already been filed under the 1918 Act when it enacted a new and retroactive statute. Had it intended to adopt for the 1921 Act the returns filed under the earlier statute, it would have been a simple matter so to provide.

Moreover, the 1921 Act was different in many respects from the 1918 Act, and the liability thereunder was changed. It so happens that the only change particularly applicable to the petitioners is the elimination of a $2,000 credit. But the fact that the change is slight as to these taxpayers cannot relieve the petitioners from the requirement that returns be filed under, and responsive to, the 1921 Act. As the court below stated (No. 37, R. 136):

> * * * the Revenue Act of 1921 changed the method of determining the gross income and the proper deductions therefrom and therefore changed the method of determining the net income. Consequently, in order that the taxpayer's return should show the gross income and the deductions therefrom according to the Revenue Act of 1921 it was essential that the taxpayer should state the same according to the method laid down in the new act. This was the return required by the act.

If petitioners are correct in their contention that the period of limitations under the 1921 Act is started by the filing of a return under the 1918 Act, then it follows that the limitation provided for in

the 1921 Act would be unequal in operation. As to returns filed subsequent to the enactment of the law, it would be effective only upon the expiration of four years, whereas to others it would constitute a bar within a shorter period, dependent upon the length of time the "return" was made before the enactment of the law.

Petitioners' contention that the period under the 1921 Act began to run upon the filing of its return under the 1918 Act must necessarily proceed upon the assumption that a limitation may operate against a liability before the liability itself has arisen or is even ascertainable. Before the 1921 statute was enacted, the Government could take no steps with respect to taxes payable thereunder. As this Court stated in *Borer* v. *Chapman,* 119 U. S. 587, 602:

> It cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced.

It is immaterial that the Commissioner could have secured the needed information from the return filed under the 1918 Act. Petitioners were under a duty to file a return under the 1921 Act. The possibility that the Commissioner could have obtained sufficient information elsewhere would not relieve petitioners of their duty. See *Florsheim Bros. Co.* v. *United States, supra,* at p. 461. In *Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245, it was held that a formal return which contained all

the necessary information and lacked only the signatures of the officers of the corporation was not a sufficient compliance with the statute.

It is true that, although the 1921 Act required a return from every corporation taxable thereunder, the Treasury Department decided to press that requirement only where the tax liability under the 1921 Act would be greater than under the 1918 Act.[8] But even under these liberal administrative rulings, petitioners should have filed an additional return, since the 1921 Act eliminated a $2,000 credit thereby increasing the aggregate tax liability.

The Board of Tax Appeals has repeatedly sustained the position taken by the Commissioner in the instant cases.[9] This view has also been fol-

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[8] T. D. 3305, I–1 Cumulative Bulletin 247; T. D. 3310, I–1 Cumulative Bulletin 248. See also Sol. Op. 138, I–1 Cumulative Bulletin 174; S. M. 3021, IV–1 Cumulative Bulletin 72. Similar rulings were made in connection with the transition from the 1917 Act to the 1918 Act. T. D. 2797, 21 T. D. 45; O. D. 71, 1 Cumulative Bulletin 234; I. T. 1875, II–2 Cumulative Bulletin 238, 243.

[9] *Appeal of Davis Feed Co.*, 2 B. T. A. 616; *John Wanamaker Philadelphia* v. *Commissioner*, 8 B. T. A. 864; *C. A. Lawton Co.* v. *Commissioner*, 13 B. T. A. 8; *Hutchinson Co.* v. *Commissioner*, 14 B. T. A. 367; *Valentine-Clark Co.* v. *Commissioner*, 14 B. T. A. 562, reversed, 52 F. (2d) 346 (C. C. A. 8th); *A. Cellers et al.* v. *Commissioner*, 16 B. T. A. 411; *Gus Holstine Dry Goods Co.* v. *Commissioner*, 16 B. T. A. 1124; *Isaac Goldmann Co.* v. *Commissioner*, 17 B. T. A. 1103, reversed, 51 F. (2d) 427 (App. D. C.); *Myles Salt Co.*,

lowed in several cases involving the transition from the 1917 Act to the 1918 Act.[10] Three appellate courts, however, have reached the opposite conclusion,[11] but it is submitted that these cases were incorrectly decided.

Ltd., v. *Commissioner*, 18 B. T. A. 742, reversed, 49 F. (2d) 232 (C. C. A. 5th); *Adams, Cushing & Foster, Inc.* v. *Commissioner*, 19 B. T. A. 89; *G. Corrado Coal & Coke Interests, Inc.* v. *Commissioner*, 19 B. T. A. 691; *Hill Goldwater* v. *Commissioner*, 21 B. T. A. 73; *E. J. Lorie* v. *Commissioner*, 21 B. T. A. 612.

It is true that among the earlier cases before the Board there was considerable confusion, and some of them were decided the other way. See *Fred T. Ley & Co., Inc.* v. *Commissioner*, 9 B. T. A. 749; *M. Brown & Co.* v. *Commissioner*, 9 B. T. A. 753; *Keystone Coal & Mining Co.* v. *Commissioner*, 10 B. T. A. 295; *Palmetto Coal Co.* v. *Commissioner*, 11 B. T. A. 154; *Farmers Elevator Co.* v. *Commissioner*, 13 B. T. A. 1079; *Denholm & McKay Co.* v. *Commissioner*, 15 B. T. A. 225.

[10] *Globe Excelsior Oak Tanning Co.* v. *United States*, 2 F. Supp. 470 (C. Cls.), certiorari denied, 290 U. S. 627; *Clifton Mfg. Co.* v. *United States*, 3 F. Supp. 508 (W. D. S. C.), affirmed, 70 F. (2d) 102 (C. C. A. 4th); *Ralston Purina Co.* v. *United States*, 58 F. (2d) 1065 (C. Cls.), certiorari denied, 289 U. S. 732. Compare *Updike* v. *United States*, 8 F. (2d) 913 (C. C. A. 8th) (transition from 1916 Act to 1917 Act), certiorari denied, 271 U. S. 661; *United States* v. *Updike*, 32 F. (2d) 1 (C. C. A. 8th) (transition from 1916 Act to 1917 Act), affirmed, 281 U. S. 489; *Whitney Bodden Shipping Co.* v. *United States*, 52 F. (2d) 1003 (C. Cls.).

[11] *Myles Salt Co.* v. *Commissioner*, 49 F. (2d) 232 (C. C. A. 5th); *Isaac Goldmann Co.* v. *Burnett*, 51 F. (2d) 427 (App. D. C.); *Valentine-Clark Co.* v. *Commissioner*, 52 F. (2d) 346 (C. C. A. 8th).

II

THE RETURNS FILED WERE SO INCOMPLETE AND MISLEADING THAT THEY WERE INSUFFICIENT TO START THE RUNNING OF THE STATUTE OF LIMITATIONS

Even assuming that a return filed under the 1918 Act may serve the function of a return under the 1921 Act, nevertheless the returns filed by these petitioners were so incomplete and misleading as not to start the running of the statute of limitations.

The A. S. Hopkins Company was affiliated with the Zellerbach Paper Company, the National Paper Products Company, and the Sanitary Products Corporation during the period from November 1, 1920, to April 30, 1921. (No. 38, R. 52.) Until December 31, 1920, the Hopkins Company kept its own books and records, but thereafter it maintained no separate books and its operations were mingled with those of the Zellerbach Company. (No. 38, R. 54.)

On March 15, 1921, the Zellerbach Company designated itself the successor of the Hopkins Company, and filed a return in the name of that company for the full calendar year 1920. (No. 38, R. 53.) The income of the Hopkins Company for the first four months of 1921 was included as part of the income of the Zellerbach Company in the return filed July 16, 1921, for the fiscal year ending April 30, 1921, by the Zellerbach Company and its two other affiliates. (No. 38, R. 53.)

In the return for the Hopkins Company for 1920 it was stated on page three thereof, in answer to question twelve, that (No. 38, R. 55):

> The entire capital stock of this Corporation has been bought by the Zellerbach Paper Co. and its entire net assets transferred as of December 31, 1920.

The affirmative answer to this question required an answer to question fourteen (Appendix B, *infra*), which called for a considerable amount of additional information. An answer to this question should have shown how the situation was changed during the year 1920. Such information was specifically required by question fourteen in accordance with Article 634 of Regulation 45 (Appendix A, *infra*), yet the question remained completely unanswered.

Furthermore, the return filed on July 16, 1921, by the Zellerbach Company and its two other affiliates gave no indication that the Hopkins Company was one of the affiliated group for which the return was made. There was no answer to the question, "Is this a consolidated return?" and at the head of the return there appeared only the following names: Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation. (No. 38, R. 55.)

Questions eleven, twelve, and thirteen (Appendix C, *infra*) which would have required certain important information as to the relationship between the

Zellerbach Company and the Hopkins Cmpany were not answered. An affirmative answer was given to the following part of question fourteen (No. 38, R. 55): "Did substantially the same conditions as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920?" This statement was entirely wrong and therefore misleading.

Although schedules were attached to the return giving information and figures pertaining to each of the other three companies, no separate information or figures were furnished regarding the Hopkins Company, and the return did not in any way show that the Hopkins Company was one of the affiliated group, nor that its income was included in the return.

It is thus evident that the returns were in important particulars incomplete and misleading. It is submitted that such a return does not start the running of the statute of limitations. *Lucas* v. *Colmer-Green Lumber Co.*, 49 F. (2d) 234 (C. C. A. 5th); *United States* v. *National Tank & Export Co.*, 45 F. (2d) 1005 (C. C. A. 5th), certiorari denied, 283 U. S. 839; *Cem Securities Corp.* v. *Commissioner*, (C. C. A. 4th), decided June 29, 1934, not officially reported, but found in 1934 Prentice-Hall Federal Tax Service, par. 1493. These cases held that a return which failed to segregate information respecting affiliated corporations was not sufficient to start the running of the statute of limitations.

A contrary result was reached in the case of *Commissioner* v. *Stetson & Ellison Co.*, 43 F. (2d) 553 (C. C. A. 3d). The instant case presents even stronger considerations for holding that the return was not sufficient to start the period of limitations, and is distinguishable from the *Stetson & Ellison* case in that unlike the situation involved in all of these cases, no information was given here to show that the return for the Zellerbach Company and its other affiliates was a return for the Hopkins Company as well. In the *Stetson & Ellison* case, *supra,* the court, in determining that the return was sufficient to start the running of the statute of limitations, pointed out (page 554) that "the names of all the companies included in the consolidation were made clear to the Commissioner."

CONCLUSION

It is respectfully submitted that the judgments of the Circuit Court of Appeals should be affirmed.

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Solicitor General.

WILLIAM STANLEY,
The Assistant to the Attorney General.

FRANK J. WIDEMAN,
Assistant Attorney General.

JAMES W. MORRIS,
ARNOLD RAUM,
Special Assistants to the Attorney General.

OCTOBER 1934.

APPENDIX A

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 200. That when used in this title—(1) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921; * * *

* * * * *

SEC. 205. (a) That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period. * * *

SEC. 227. (a) That returns (except in the case of nonresident aliens) shall be made

on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March. * * *

SEC. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount.

* * * * *

SEC. 236. That for the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

* * * * *

(b) In the case of a domestic corporation the net income of which is $25,000 or less, a specific credit of $2,000; but if the net income is more than $25,000 the tax imposed by section 230 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000; * * *

SEC. 239. (a) That every corporation subject to taxation under this title * * * shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title * * *.

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return

was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

SEC. 263. That this title shall take effect as of January 1, 1921.

SEC. 1303. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

(U. S. C., Title 26, Sec. 1245.)

* * * * *

SEC. 1400. (a) That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

Title II (called "Income Tax") as of January 1, 1921;

* * * * *

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if the petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(U. S. C. App., Title 26, Sec. 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess-profits and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the re-

turn was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

(U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with the intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

* * * * *

(U. S. C. App., Title 26, Secs. 1058 and 1061.)

Treasury Department Regulations 45 (1920 ed.), promulgated January 28, 1921:

> ART. 631. *Affiliated corporations.* — The provision of the statute requiring affiliated corporations to file consolidated returns is based upon the principle of levying the tax according to the true net income and invested capital of a single business enterprise, even though the business is operated through more than one corporation. * * *
>
> ART. 632. *Consolidated returns.* — Affiliated corporations, as defined in the statute and in article 633, are required to file consolidated returns on form 1120. The consolidated return shall be filed by the parent or principal reporting corporation in the office of the collector of the district in which it has its principal office. Each of the other affiliated corporations shall file in the office of the collector of its district form 1122, along with the several schedules indicated thereon. The parent or principal corporation filing a consolidated return shall include in such return a statement specifically setting forth (a) the name and address of each of the subsidiary or affiliated corporations included in such return, (b) the par value of the total outstanding capital stock of each of such corporations at the beginning of the taxable year, (c) the par value of such capital stock held by the parent corporation or by the same interests at the beginning of the taxable year, (d) in the case of affiliated corporations, the stock of which is owned or controlled by the same interests, a list of the individuals or partnerships constituting such interests, with the per-

centage of the total outstanding stock of each affiliated corporation held by each of such individuals or partnerships during all of the taxable year, and (e) a schedule showing the proportionate amount of the total tax which it is agreed among them is to be assessed upon each affiliated corporation. * * *

ART. 633. *When corporations are affiliated.*—Corporations will be deemed to be affiliated (a) when one domestic corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (b) when substantially all the stock of two or more domestic corporations is owned or controlled by the same interests. * * *

ART. 634. *Change in ownership during taxable year.*—When one corporation owns or controls substantially all the stock of another corporation at the beginning of any taxable year, but during the taxable year sells or parts with the control of all or a majority of such stock to outside interests not affiliated with it, or when one corporation during any taxable year acquires the ownership or control of substantially all the capital stock of another corporation with which it was not previously affiliated, a full disclosure of the circumstances of such changes in ownership shall be submitted to the Commissioner. In accordance with the peculiar circumstances in each case the Commissioner may require separate or consolidated returns to be filed, to the end that the tax may be equitably assessed.

APPENDIX B

Form 1120, Corporation Income and Profits Tax Return for Calendar Year 1920 (p. 3):

Affiliations with other corporations (to be answered by every corporation).

* * * * *

14. If the answer to questions 11, 12, and 13, or to any of them, is " yes ", answer the following:

(a) Did the corporation file Affiliated Corporations Questionnaire, Form 819, for 1917 or subsequent taxable years? Answer "Yes" or "No." ------. If the answer to this question is "yes", a questionnaire is not required, except under the circumstances described in question (b). If the answer to this question is "no", and the answer to questions 11, 12, and 13, or to any of them, is "yes", procure from the Collector of Internal Revenue for your district Form 819, which shall be filled out and filed as a part of this return. If the answer to this question is "no", question (b) need not be answered.

(b) Did substantially the same conditions, as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920? Answer "Yes" or "No." ------. If the answer to this question is "no", a statement setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stockholdings, a complete

schedule of such changes should be submitted in the form prescribed in tables 3 and 6 of the questionnaire. If there are companies other than those covered by the questionnaire for 1919 or prior years which, applying the tests contained in questions 11, 12, or 13, may have come into the affiliated group since 1919, a questionnaire, Form 819, is required for the entire group for the taxable period.

APPENDIX C

Form 1120, Corporation Income and Profits Tax Return (used in the July 16, 1921 return) (p. 3):

Affiliations with other corporations (to be answered by every corporation).

11. Does the corporation own directly or control through closely affiliated interests or by a nominee or nominees over 50 percent of the outstanding voting capital stock of another corporation or of other corporations? ------

12. Is over 50 percent of your outstanding voting capital stock owned by another corporation or by two or more corporations that are affiliated? ------

13. Is over 50 percent of your outstanding voting capital stock as well as over 50 percent of the outstanding voting capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals or partnerships? ------

14. If the answer to questions 11, 12, and 13, or to any of them, is "yes", answer the following:

(a) Did the corporation file Affiliated Corporations Questionnaire, Form 819, for 1917 or subsequent taxable years? Answer "Yes" or "No." *Yes.* If the answer to this question is "yes", a questionnaire is not required, except under the circumstances described in question (b). If the answer to this question is "no", and the answer to ques-

tions 11, 12, and 13, or to any of them, is "yes", procure from the Collector of Internal Revenue for your district Form 819, which shall be filled out and filed as a part of this return. If the answer to this question is "no", question (b) need not be answered.

(b) Did substantially the same conditions, as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920? Answer "Yes" or "No." *Yes.* If the answer to this question is "no", a statement, setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stockholdings, a complete schedule of such changes should be submitted in the form prescribed in Tables 3 and 6 of the questionnaire. If there are companies other than those covered by the questionnaire for 1919 or prior years which, applying the tests contained in questions 11, 12, or 13, may have come into the affiliated group since 1919, a questionnaire, Form 819, is required for the entire group for the taxable period.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

Nos. 37, 38, 39.—October Term, 1934.

Zellerbach Paper Company, Petitioner,
37 *vs.*
Guy T. Helvering, as Commissioner of Internal Revenue, Respondent.

Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, Petitioner,
38 *vs.*
Guy T. Helvering, as Commissioner of Internal Revenue, Respondent.

National Paper Products Company, Petitioner,
39 *vs.*
Guy T. Helvering, as Commissioner of Internal Revenue, Respondent.

On Writs of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[November 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy in these cases hinges upon the date when the statute of limitations began to run against deficiency assessments by the Commissioner of Internal Revenue.

On July 16, 1921, Zellerbach Paper Company filed a consolidated income and profits tax return in behalf of itself and a subsidiary, National Paper Products Company, for the fiscal year beginning May 1, 1920, and ending April 30, 1921.

On March 15, 1921, it filed an income and profits tax return for the calendar year 1920 in behalf of A. S. Hopkins Company, a dissolved subsidiary, including in its own consolidated return the income of the A. S. Hopkins Company between January 1, 1921 and the date of dissolution.

At the filing of these returns the income and profits tax statute applicable to the taxpayers was the Revenue Act of 1918 (40 Stat. 1057). Later (on November 23, 1921) another tax statute,

the Revenue Act of 1921 (42 Stat. 227), became a law, with a provision (§ 263) that it should take effect retroactively as of January 1, 1921.

By the Act of 1921 (§ 239a) every corporation subject to taxation thereunder was required to "make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title." Treasury Decisions issued by the Commissioner in March, 1922 (T. D. 3305, March 16, 1922, amended by T. D. 3310, March 28, 1922[1]) gave notice in substance that taxpayers who had filed returns under the Act of 1918 and who were subject to an additional tax for the same period under the Act of 1921, should file a new or supplemental return covering such additional tax. By implication this was a ruling that an additional return was not required of taxpayers whose taxes were not increased by the new law. By implication also the new return was to be limited to a statement of the facts or figures necessary to exhibit the additions, without repetition of facts or figures that had been well returned already.

The Act of 1921 in its application to the petitioners made one change and one only. If the net income of the taxpayer was more than $25,000, there was to be a denial of the credit or exemption of $2,000 otherwise allowable. § 236b. The fiscal year of the petitioners ran, as we have seen, from May 1, 1920, to April 30, 1921, and of this period one-third was in the calendar year 1921. The net income being largely in excess of $25,000, the effect of the new law was to cut down the permissible credit by one-third of $2,000, thus increasing the tax by little more than a nominal amount. What that amount was could be ascertained by a simple computation, dependent upon data fully supplied by the return already filed, and calling only for the application of the statutory rule.

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[1]The text of the amended decision is as follows:

"If any taxpayer has, before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under the Revenue Act of 1918, and is subject to additional tax for the same period under the Revenue Act of 1921, a return covering such additional tax shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the laws and regulations, and payment of such additional tax will be due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. . . ."

The petitioners did not make a new or supplemental return correcting the computation in the one on file. The change was so trivial and so obvious as perhaps to lead them to believe that no amendment was expected. Be that as it may, they heard nothing more from the Bureau of Internal Revenue with reference to their taxes till May 11, 1928, an interval of nearly seven years, when they received from the Commissioner notices of deficiency assessments in large amounts upon grounds unrelated (except for the deduction already mentioned) to any changes in the law. The Revenue Act of 1921 provides (§ 250d) that income and profits taxes shall be determined and assessed by the Commissioner within four years after a return is filed. If the return filed by the petitioners or in their behalf in July, 1921, served to set in motion the term of limitation, the assessments were too late. The Board of Tax Appeals, however, upheld the action of the Commissioner, and ruled (two members dissenting) that the return on file was a nullity, and hence that the statute of limitations had never been set running. 26 B. T. A. 96. The Court of Appeals for the Ninth Circuit affirmed. 69 F. (2d) 852. In so doing, it refused to follow decisions directly to the contrary by courts of coördinate jurisdiction. *Myles Salt Co., Ltd.* v. *Commissioner,* 49 F. (2d) 232 [Fifth Circuit]; *Isaac Goldmann Co.* v. *Commissioner,* 51 F. (2d) 427 [Court of Appeals, District of Columbia]; *Valentine-Clark Co.* v. *Commissioner,* 52 F. (2d) 346 [Eighth Circuit]. Because of that conflict writs of certiorari were granted by this Court. 292 U. S. 621.

The opinion of the court below rests heavily upon the argument that what is required by the statute is a return under the act, and that this excludes by implication a return by the taxpayer before the act became a law. Various sections are cited as enforcing that conclusion. See, e. g., §§ 205a, 239a, 250d, which so far as material are quoted in the margin.[2] But the Act of 1921 was retroactive (§§ 263, 1400), taking effect, as we have seen, as of the beginning of the year. Being law by relation, to the disadvantage of the taxpayer, in respect of the burden of his tax, it may well

[2] § 205a: "That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920, which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax

have been law by relation to his benefit in respect of the form and time of his return. There is no anomaly, to say the least, in such a rule of reciprocity. Indeed, there are special reasons why this very result must have been thought of in the framing of the statute. If a new return was required, when was it to be due? The statute tells us (§§ 227a, 241a) that when a taxpayer makes his return on the basis of a fiscal year, the time for filing shall be the fifteenth day of the third month following the close of such year, which for these petitioners was the fifteenth of July. Thus the date fixed for filing was far in advance of the date when the statute was enacted. From this the inference is a fair one that returns already filed were continued in effect, being treated as if made under the new act, which thus adopted and renewed them. Otherwise the taxpayer was placed in default before the duty was imposed. Nor is there anything unworkable in thus applying the doctrine of relation to keep returns alive. To the extent that gross income or deductions were to be computed differently thereafter, the Commissioner could make the necessary adjustment in connection with his audit. Moreover by virtue of his general power to make "all needful rules and regulations" with the approval of the Secretary (§ 1303), he might require of taxpayers whatever supplementary information would be necessary to enable him to act correctly. This, as we have seen, he did, designating a new date selected by himself and wholly unrelated to the fiscal year covered. The validity of such a regulation will be assumed and indeed is not contested. None the less, the return exacted by the statute, the one that in the absence of fraud is to start the term of limitation (§ 250d), is the return filed by the taxpayer at the close of the fiscal year, though supplementary information may modify or add to it. Cf. *Florsheim Bros. DryGoods Co., Ltd.* v. *United States*, 280 U. S. 453, 462.

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for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period."

§ 239a: "That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title."

§ 250d: "The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, . . ."

A different conclusion would lead in practice to complications and injustice. Many taxpayers filing returns under the Act of 1918 were unaffected by the changes wrought by the Act of 1921. Their returns, if made over again, would have been an exact reproduction of those they had made already. A statute would have to be very plain to justify a holding in such circumstances that there was an obligation to report anew. Certainly the average man would be slow to suspect that he was subject to such a duty. If he looked into the Treasury Decisions, he would learn that the Commissioner agreed with him. In these he was told by the plainest implication that unless he had an additional tax to pay, his return would stand as filed, without supplement or correction. Now, the Commissioner of Internal Revenue is without dispensing power. If a return under the old act is not good under the new one, but, instead, is an utter nullity, he may not relieve the taxpayer of making a return over again. To this the Government assents, and on it builds the argument that the first returns are to be disregarded altogether, whether more is due or nothing. In that view, hundreds of taxpayers, perhaps thousands, though innocent of wilful wrong, have been deprived of the protection of any rule of limitation, not to speak of other penalties unwittingly incurred. A statute of uncertain meaning will not readily be made an instrument for so much of hardship and confusion.

Administrative construction, confirmed by acts of Congress, brings reinforcement to the argument. Reference has been made already to the Treasury Decisions issued in March, 1922. The pertinent administrative history, however, does not begin at that point. It goes back to earlier statutes presenting a like problem. In the transit from the Revenue Act of 1917 to the Act of 1918 (40 Stat. 1057), there was the same gap to be filled, the same necessity for determining the standing of returns made on a fiscal year basis before the new act became law. Treasury Decision 2797, issued by the Commissioner March 11, 1919, was designed to guide the taxpayer in that predicament. It is quoted in the margin.[3]

[3] "If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the revenue act of 1917, and is subject to additional tax for the same period under the revenue act of 1918, the return covering such additional tax shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is

It calls for an additional return when an additional tax is due, but not at other times. It treats the whole tax, computed under both returns, as made up of separate parts, one the part due under what is styled "the original return," and the other the additional part due "under the amended return." This regulation was in substance re-adopted in the regulations already referred to under the Act of 1921. There are verbal variations, but not of such a nature as to suggest a change of meaning. The like is true of a Treasury Decision issued under the Revenue Act of 1926 (44 Stat. 9; T. D. 3843). All these regulations have had the tacit assent and confirmation of the lawmakers. Successive revenue statutes have been enacted without substantial change in the applicable sections. Congress seemingly has been satisfied with the Decisions of the Treasury and with the interpretation of its own meaning implicit in them. *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492, 493; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315.

From this administrative history the inference is compelling that a second return, reporting an additional tax, is an amendment or supplement to a return already upon the files, and being effective by relation does not toll a limitation which has once begun to run. *Florsheim Bros. DryGoods Co., Ltd.* v. *United States, supra.* Cf. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67; *N. Y. Central R. Co.* v. *Kinney,* 260 U. S. 340, 346. Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such (*Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245), and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary. Even more clearly is it so when the return is full and accurate in the beginning under the statutes then in force, but is made inaccurate or incomplete by supervening changes of the law, unforeseen and unforeseeable. Supplement and correction in such

due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the original return and additional tax due under the amended return, will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918."

circumstances will not take from a taxpayer, free from personal fault, the protection of a term of limitation already running for his benefit. Cf. *Myles Salt Co., Ltd.* v. *Commissioner, supra,* at p. 233; *Valentine-Clark Co.* v. *Commissioner, supra,* at p. 349. At the very least the statutes are sufficiently ambiguous to be susceptible of that construction without strain upon their meaning. So in effect the Commissioner has construed them by relieving taxpayers of the duty of filing a new return except for additional taxes and by treating such new return as an amendment or a supplement. So this Court construes them now.

In the argument for the Government much is made of the point that in giving effect for any purpose to the original return we cut down the period available to the Bureau for audit and assessment. The reduction, however, is not serious. In the first place, it applies only to that part of the taxable year as to which the two statutes overlap. In the second place, the return in its first form was subject to immediate audit in respect of everything embraced within it. Indeed, at that time the examiners could not know whether a new statute would be passed before the end of the calendar year, or whether the changes would be great or small. Whatever shortening of time there has been is limited to those matters as to which the statutes differ from each other. Even for that purpose, however, the time available was ample. Almost three years and eight months were left for carrying the audit to completion. The curtailment is too slight, the inconvenience too nearly negligible, to affect the process of construction.

A middle ground has been suggested, a path of compromise between the position of the petitioners at one extreme and that of the Government at the other. Some such compromise is indicated, it seems, in decisions of the Board of Tax Appeals, though the rulings of the Board in that respect are involved in some obscurity. At all events, the suggestion is that the term of limitation shall run from the new return when it appears on the face of the original return that because of the changes in the law a tax will be due beyond the liability reported,[4] and that the limitation shall run

[4]See, e. g., Isaac Goldmann Co. *v.* Commissioner, 17 B. T. A. 1103 (reversed, 51 F. (2d) 427); Myles Salt Co., Ltd. *v.* Commissioner, 18 B. T. A. 742, 744 (reversed, 49 F. (2d) 232); G. Corrado Coal & Coke Interests, Inc. *v.* Commissioner, 19 B. T. A. 691; E. J. Lorie *v.* Commissioner, 21 B. T. A. 612.

from the original return when there is nothing on the face of that return to indicate that the liability reported is less than is owing.[5] The statute supplies no basis for such a principle of division. An examiner needs more time for an audit when errors are latent, to be discovered only by digging into books and vouchers, than when errors are apparent upon a bare inspection of the record. It would be a strange rule of limitation that would vary his opportunity inversely to his needs.

One other contention of the Government is stated merely to exclude it from the scope of our decision. The Government makes the point that the petitioners' return, even if filed at the proper time, must be held to be a nullity for the reason that it commingles the income of the affiliated companies, parent and subsidiary, with that of another company, the A. S. Hopkins Company, previously dissolved. No such point was considered by the court below, nor was it suggested either in the petition for certiorari or in any response thereto. Review by this Court will be limited accordingly. *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 494; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91.

The decree should be reversed and the cause remanded for further proceedings in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[5]See, e. g., Fred T. Ley & Co. *v.* Commissioner, 9 B. T. A. 749, 751; Palmetto Coal Co. *v.* Commissioner, 11 B. T. A. 154; Denholm & McKay Co. *v.* Commissioner, 15 B. T. A. 225.